ADMINISTRATIVE LAW BULLETIN

VOLUME 11 — WINTER ISSUE, 1958

Editor-in-Chief:

VICTOR G. ROSENBLUM, Northwestern University, Evanston, Ill.

Managing Editor:

JOSEPH DUCOEUR, World Center Bldg., Washington 6, D. C.

Associate Managing Editor:

CHARLES E. HOFFHAUS, Bryant Bldg., Kansas City 6, Mo.

Board of Editors:

LEO A. HUARD, Georgetown University, Washington, D. C.
HANS KLAGSBRUNN, Ring Bldg., Washington 6, D. C.
REUBEN HALL, 75 Federal St., Boston 10, Mass.
J. D. BOND, 1415 North Adams, Arlington, Va.
EDWIN S. ROCKEFELLER, Federal Trade Commission, Washington 25, D. C.
JEROME HECKMAN, Munsey Bldg., Washington 4, D. C.
CHARLOTTE MURPHY, P. O. Box 7783, Washington, D. C.

ADMINISTRATIVE LAW SECTION

AMERICAN BAR ASSOCIATION

Cite by Volume and Page

(Cite — Ad. Law Bull.—)

PRINTED BY
THE LORD BALTIMORE PRESS, INC.
BALTIMORE, MD.

CONTENTS

CHAIRMAN'S PAGE 61

SOME OBSERVATIONS ABOUT THE ADMINISTRATIVE PROCESS. By David W. Kendall, *Special Counsel to the President of the United States* 62

I. ASSISTANCE AVAILABLE TO THE PUBLIC FROM GOVERNMENT AGENCIES.

INTRODUCTION. By Thomas G. Meeker, *Moderator, General Counsel, Securities and Exchange Commission* . 72

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE FEDERAL TRADE COMMISSION. By John W. Gwynne, *Chairman, Federal Trade Commission* 73

THE FEDERAL TRADE COMMISSION'S PROCEDURES FOR VOLUNTARY COMPLIANCE. By Jerrold G. Van Cise, *Vice Chairman, Anti-Trust Section, American Bar Association* . 75

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE SECURITIES AND EXCHANGE COMMISSION. By Edward N. Gadsby, *Chairman, Securities and Exchange Commission* 79

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE FEDERAL POWER COMMISSION. By Jerome K. Kuykendall, *Chairman, Federal Power Commission* 84

A PRIVATE PRACTITIONER'S VIEW OF ASSISTANCE AVAILABLE TO THE PUBLIC FROM THE FEDERAL POWER COMMISSION. By J. David Mann, Jr. 86

INTERPRETATIVE ADVICE AVAILABLE TO PRACTITIONERS AND THE PUBLIC FROM THE INTERSTATE COMMERCE COMMISSION. By Everett Hutchinson, *Commissioner, Interstate Commerce Commission* 90

INTERPRETATIVE ADVICE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE CIVIL AERONAUTICS BOARD. By Franklin M. Stone, *General Counsel, Civil Aeronautics Board* 94

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE FEDERAL COMMUNICATIONS COMMISSION. By Arthur W. Scharfeld 101

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE DEPARTMENT OF AGRICULTURE. By Charles W. Bucy, *Assistant General Counsel, Department of Agriculture* 107

SOME PROBLEMS POSED BY "ADVISORY RULINGS" FROM GOVERNMENT AGENCIES. By Donald C. Beelar, *Immediate Past Chairman, Administrative Law Section, American Bar Association* 111

QUESTION AND ANSWER PERIOD 113

II. CONDUCT OF ADMINISTRATIVE PROCEEDINGS—PRE-TRIAL DISCOVERY ROLE OF THE EXAMINER.

INTRODUCTION. By Valentine B. Deale, *Moderator, Immediate Past Chairman, Administrative Law Section, D. C. Bar Association* 121

THE PRE-HEARING CONFERENCE IN HEARINGS ON COMPARATIVE BROADCAST APPLICATIONS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION. By John C. Doerfer, *Chairman, Federal Communications Commission* 122

QUESTION AND ANSWER PERIOD 130

PRE-HEARING PROCEDURES AT THE FEDERAL TRADE COMMISSION. By Frank Hier, *Hearing Examiner, Federal Trade Commission* 139

QUESTION AND ANSWER PERIOD 144

PRE-HEARING PROCEDURES AT THE CIVIL AERONAUTICS BOARD. By Seymour Wenner, *Former Chief, Legal Staff, Routes Division, CAB* 150

QUESTION AND ANSWER PERIOD 156

III. NEGOTIATION AND SETTLEMENT.

INTRODUCTION. By Sigurd Anderson, *Moderator, Commissioner, Federal Trade Commission* 161

CONSENT SETTLEMENT PROCEDURES IN THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE. By Robert A. Bicks, *First Assistant to the Assistant Attorney General, Antitrust Division* 162

QUESTION AND ANSWER PERIOD 165

CONSENT SETTLEMENT PROCEDURES IN THE FEDERAL TRADE COMMISSION. By L. E. Creel, Jr., *Legal Adviser, Bureau of Litigation, Federal Trade Commission* 169

QUESTION AND ANSWER PERIOD 171

Negotiation and Settlement Procedures in the Federal Power Commission. By Willard W. Gatchell, *General Counsel, Federal Power Commission* 174

Question and Answer Period 179

IV. Agency and Judicial Review.

Introduction. By Wm. R. Connole, *Moderator, Commissioner, Federal Power Commission* 184

Procedures for Review Within the Federal Communications Commission. By Rosel H. Hyde, *Commissioner, Federal Communications Commission* 184

Procedures for Review Within the Federal Trade Commission. By Robert R. MacIver, *Asst. Director, Bureau of Litigation, Federal Trade Commission* 187

Review of Securities and Exchange Commission Decisions. By Daniel J. McCauley, Jr., *Associate General Counsel, Securities and Exchange Commission* . . . 190

Judicial Trends in the Review of Administrative Agency Decisions. By Oscar H. Davis, *First Assistant to the Solicitor General* 194

Values of Judicial Review of Administrative Agency Proceedings. By Anthony Lewis, *Washington Bureau, New York Times* 198

Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

Digitized by the Internet Archive
in 2026

https://archive.org/details/administrative-law-review_winter-1958_11

CHAIRMAN'S PAGE

On December 11 and 12, the Section conducted its first Institute on Practical Problems before Federal Administrative Agencies. More than 300 lawyers attended and participated in the work of the Institute and it was especially gratifying to have the enthusiastic participation of leading government officials and private practitioners from all parts of the United States.

I would like personally and on behalf of the Section to thank Gilbert Cuneo, Chairman of the Institute Committee, and his fellow committee members for the outstanding job they preformed in planning and executing the Institute. Don Beelar, William Connole, John Fitzgerald, Bernard Gallagher, Willard Gatchell, Bob Ginnane, Earl Kintner, Hans Klagsbrunn, Harold Leventhal, Adolph Magidson, Tom Meeker, Frank Stone and the Section's charming secretary, Betty Smith, worked diligently with Gil Cuneo to make this pioneering venture the resounding success it was.

To bring as much as possible of the Institute's content and flavor to all our members, this issue of the Bulletin contains the major addresses and substantial excerpts from the discussions during the four sessions of the Institute. A stimulating talk by Robert Stern on the work of the Solicitor-General's office in handling administrative law cases will appear in the near future in the ABA Journal.

The Section will be happy to note that a Special Subcommittee on Administrative Procedure has been established by the Senate Judiciary Committee. Senator Carroll of Colorado is Chairman and the other members are Senator Dirksen of Illinois and Senator Hart of Michigan. The Subcommittee will examine current problems in administrative procedure and practice and is required to report its findings to the Senate by January 1960.

The Section's Committee on Code of Agency—Tribunal Standards of Conduct, headed by Judge Peck, is completing the draft of the proposed code, and the Midyear meeting in Chicago affords all of us the opportunity to consider in detail this significant contribution to our field.

I regret the inadvertent omission of Ruth Smalley's name from the Ad Hoc Committee's report which appeared in the last issue of the Bulletin.

JOHN B. GAGE, *Chairman*

SOME OBSERVATIONS ABOUT THE ADMINISTRATIVE PROCESS

By David W. Kendall,
Special Counsel to the President of the United States

I

I welcome this opportunity to participate in the proceedings of this Institute on Practical Problems Before Federal Administrative Agencies.

During the next two days intensive consideration is to be given to some of the more urgent problems of the federal administrative agencies and of those lawyers who practice before them.

The decision to hold this Institute is but another manifestation of the abiding interest of the American Bar Association in the improvement of the administrative process and constitutes the latest of the many worthwhile contributions which the Association, through its Section of Administrative Law, has made to the improvement of the process.

My own interest in the administrative process stems not merely from a recognition of its great importance under our system of law but also from my pre-occupation with this subject during the many years I have devoted to it in private practice and during the time I have occupied government positions in which I have been directly responsible for the operation of the process in certain areas. As General Counsel and later as Assistant Secretary of the Treasury, I have had an opportunity at first hand to observe the administrative process in action and, in my present position, I am equally concerned with it. I feel that my experience has given me a practical knowledge of some of the important matters concerning the administrative process of the federal government, and I hope that my observations concerning these matters will contribute to the success of this Institute.

II

I understand that the primary concern of the Section of Administrative Law is with the procedural aspects of the administra-

tive process. This is largely due to the organization of the American Bar Association under which other committees and other sections of the Association deal with the substantive features of administrative law.

This raises a basic question, namely, why should the American Bar Association establish and maintain one of its largest sections for the sole purpose of inquiring into the procedural aspects of administrative law?

I submit that there are two basic reasons for concern with the procedural aspects of the administrative process.

The *first* reason is that most of the present functions of government are performed by administrative agencies and this, in turn, means that the majority of persons coming into contact with the federal government do so in proceedings—formal and informal—before federal administrative agencies.

This is true both with respect to rule-making and to adjudication. Most of the rules affecting persons in this country are made by federal administrative agencies and not by the Congress; and most of the controversies between citizen and citizen and between citizens and the government are today resolved by the administrative process and not by the courts. So far as I know, no exact estimate has ever been made of the percentage of administrative proceedings which ultimately reaches the courts under our system of judicial review, but it is obvious to anyone versed in the practice of administrative law that only a relatively small percentage of the matters dealt with by administrative agencies ever do reach the courts.

It has been estimated that there are now some 130 administrative agencies of one sort or another, operating under some 2,000 instances of power delegated by the Congress to prescribe rules and regulations; and many of these agencies also have authority to decide cases and controversies. I realize that, in making this statement, the exact number of agencies in existence today depends somewhat upon the manner in which they are classified. For example, in the Report of the Conference on Administrative Procedure called by the President of the United States on April 29, 1953, it is stated that the Attorney General prepared a list of those departments and agencies of the federal government which have adjudicatory and rule-making functions and that he listed fifty-seven such departments and agencies. These included the cabinet departments, the major independent administrative

agencies, other independent commissions and boards, and a number of administrations and services within the cabinet departments.

The important point to note about all of this is simply that, as I have stated, most of the regulations involving persons in this country today are made through the administrative process, which also decides most of the controversies involving them. This being true, it is but natural that the American Bar Association—as well as other persons and organizations in this country—should be vitally concerned with the procedural aspects of the administrative process.

This leads me to the *second* reason why this subject is of such importance. I submit that administrative procedure is important in and of itself as a necessary means of preserving and maintaining the integrity of the substance of the administrative process.

It is as important to appear to do justice in the administrative realm as it is to do justice. One of the chief characteristics of the American people is their insistence upon fair play in all matters affecting them. This is deeply rooted in the concept of due process which pervades our legal institutions. As long as the rules and procedure by which a decision is reached are fair, most Americans, in the end, will abide by the substantive decision which is made. But let a decision—however just from a substantive point of view—be made without abiding by rules of fair procedure, and the average person will never be satisfied with the result.

Aside from the necessity of abiding by fair procedural rules in reaching a result for the sake of appearance alone, it is also necessary to abide by fair rules of procedure in order to reach that result. All lawyers know the importance of procedure in reaching substantive results. Fair rules cannot be written and fair decisions cannot be made in the absence of adequate procedure designed to achieve these ends.

In view of these circumstances, it is not difficult to understand why there is such pre-occupation in this country today with the procedural aspects of the administrative process.

I hope this interest will continue, and that organizations such as the American Bar Association will never for one moment be diverted from their concern with the procedural aspects of the administrative process. Only in this way can the problems be solved in the best interests of the general welfare.

III

I also think it is important to mention some of the matters which have given rise to problems which are now the object of controversies within and without this Association and before the Congress. I need only mention them in order to remind you of these topics: Rule-making; Adjudication; Separation of Functions; Public Information; Institutional Decisions; Independent Hearing Examiners; Judicial Review; Right to Practice; Conduct of Proceedings; Negotiation and Settlement; Office of Administrative Procedure; Rules of Evidence; and Methods of Discovery.

With regard to these and other subjects of present concern, many proposals have been made by this Association and by other persons and organizations. Both the Congress and the executive and judicial branches of the government will be concerned with these matters in the future.

We cannot expect a unanimity of view on these important subjects. Honest differences of opinion with regard to these proposals must be accepted as a fact of life. The best way to deal with the problems of administrative procedure is not susceptible to mathematical determination. Individual judgment is involved as well as personal predilections. We must also recognize that special interest groups, in some instances, may favor the maintenance of the *status quo* and, in other instances, a change.

I have no doubt, however, that in the end, the controversies which rage about these topics will be settled by the same process which results in the settlement of all great public issues in this country. There must be give and take and compromise, with the expectation that the end result will be to advance the cause of the administrative process. If it does not, we can rest assured in the knowledge that the way is open to continue to strive for the ideals which we hold.

IV

This leads me to observe that there are two things which all of us concerned with the administrative process must do.

First, we must strive to understand the administrative process as it is at the present. This is necessary, from the standpoint of the private practitioner, if he is adequately to represent his client before federal administrative agencies under our present system.

A lawyer who now has a case before an agency cannot be too concerned with what the procedure may be five years from now.

It is essential that he understand the procedure as it now exists. Admittedly, this is no easy task with the multiple agencies presently operating, and with their varied rules and regulations and legislative backgrounds. But I do believe that it is one of the first duties of the private practitioner to strive to improve his understanding of the present administrative process if he is to survive in his profession.

It goes without saying that a similar understanding is necessary on the part of those lawyers who are actually concerned with operating the administrative agencies. Although agency lawyers perhaps have more leeway than private lawyers, for reasons which I will mention in a moment, it is, nevertheless, equally essential for the government lawyer on the staff of the agency to understand the present process. The leeway available to the agency lawyer which I just mentioned stems from the circumstance that, frequently, the procedure respecting a given matter is not clear, and, if such agency lawyer happens to occupy a position involving the decisional process, he is sometimes able to shape the growth of the procedure in the direction in which he wishes. When confronted with a similar situation, the private lawyer can only argue as to what the procedure should be.

Nevertheless, while there are many areas of procedural administrative law which have not been clearly outlined, the basic ground rules have been resolved, and it is possible to understand them by diligent application. I submit that it is the first duty of both the private and agency lawyer to apply himself to understanding this process as it now operates.

The *second* duty of every lawyer interested in the development of the procedural aspects of the administrative process is to understand the proposals for changes which have been made by many different persons and organizations and to take an active part in promoting those proposals which appeal to his judgment. Only in this way can there be any hope for the future of administrative law.

V

To understand the present administrative process and the proposals for its improvement, it is absolutely necessary to bear in mind its unique origin. Unlike the situation with regard to our other legal institutions, no real attention has been given—until the last thirty years—to a master plan for the creation and functioning

of administrative agencies. A brief reference to some interesting historical facts will show what I mean.

During the very first session of the first Congress a plan of organization was adopted which served as a basis for the subsequent development of our cabinet departments and our system of courts. Thus, under legislation enacted by the first Congress, the administrative duties of the central government were distributed between three departments—Foreign Affairs (or State, as it soon became), War, and Treasury.

Insofar as the courts are concerned, by the Judiciary Act of 1789, the Congress provided for the establishment of a Supreme Court with a Chief Justice and five associates; a "district court" and a district judge for each of the states; and three "circuit" courts whose benches were to be filled by two Supreme Court Justices and the judge of the district within which the court happened to be sitting.

The final section of the Judiciary Act of 1789 also provided for the appointment of

> * * * a meet person, learned in the law, to act as attorney general for the United States * * * to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the Departments, touching any matters that may concern their Departments.

The first Attorney General, Edmund Randolph, was given a salary of $1500 per year which he was expected to augment by private practice on the side. This salary was soon increased by $400, but Randolph was given no office and no clerk, as he was expected to provide these out of his private means. It was not until 1817 that the Congress provided the Attorney General with an office in the Treasury and a clerk at $1,000 a year, with a small contingent fund of $500 for such essentials as stationery, fuel "and a boy to attend the menial duties."

Parenthetically, it is interesting to note that it has been estimated that there are now approximately 5,300 attorneys in 54 departments and agencies of the executive branch of the government, exclusive of the Department of Defense, and, within that Department, that there are approximately 1,300 civilian attorneys and 3,100 military personnel who perform exclusive legal duties.

Two thoughts stand out in my mind from a review of these historical facts concerning our traditional legal institutions:

The *first* is that, in a general way, a basic pattern was established in the Judiciary Act of 1789 whereby the courts and the office of Attorney General were to develop. This is not the occasion to note the changes which took place in this respect after these simple beginnings. The fact is that, insofar as these institutions are concerned, the plans of 1789 have vitality today.

The basic idea behind the Judiciary Act of 1789 still prevails insofar as the courts and the basic organization of performance of legal services are concerned.

By way of contrast, the development of administrative agencies in this country has not proceeded according to any basic plan. No master blueprint has been responsible for their creation and growth. Each has been an *ad hoc* solution to meet a particular exigency.

The *second* point we learn from history is that, unlike the humble origin of the office of the Attorney General, for the most part our modern administrative agencies came into being full-blown, that is to say, they were established under acts of the Congress delegating to them vast powers and authority; and they were given, at the outset, full staffs and other means of performing their duties.

The big period of growth of federal administrative agencies began in 1887 with the establishment of the Interstate Commerce Commission, although administrative law was not unknown either in the colonial period or at the very outset of our government. For example, during the first administration of George Washington, it has been estimated that some nineteen delegations of legislative power were made to executive officers.

I think it is interesting to note that, during this time of Washington's administration, a Patent Board was established with the Secretaries of State and War and the Attorney General as members. It is said that Secretary Jefferson would summon Secretary of War Knox and Attorney General Randolph whenever an application for a patent came into the Department of State and the three of them would personally examine it most critically.

In the period of 60 years between the establishment of the Interstate Commerce Commission in 1887 and the Atomic Energy Commission in 1949, over 100 agencies were established and authorized

to exercise delegated powers. Thus was the modern administrative process established.

Furthermore, we know that there are all varieties of agencies at the present. Some are called independent regulatory agencies, while other agencies are established within the cabinet departments. They exercise a variety of powers, and the Congress has never followed any uniform pattern in drafting the basic standards underlying our great modern administrative agencies. Neither has the Congress adopted any such pattern with respect to the procedural aspects of the administrative process.

The important point to note about all of this is that many problems have been created because of the fact that none of our administrative agencies have been created in accordance with a system or a pattern.

VI

The evidence of the last 30 years demonstrates clearly that many persons and organizations, within and without the government, have felt the need of affirmative action to give direction to the future development of administrative law.

The recent history of the movement for changes in the administrative process is familiar to all of you.

During the middle thirties, this Association first established its Special Committee on Administrative Law, and, at first, this committee was preoccupied with proposals to establish an administrative court. As we all know, this proposal was later abandoned in favor of an Administrative Procedure Act which was enacted into law in 1946. This Act was also the result of the pioneering work of the Attorney General's Committee on Administrative Procedure.

Prior to 1946, the only significant statutory change in the field of administrative law was the Federal Register Act which, for the first time, in the late thirties, required the publication of regulations of the administrative agencies. The Administrative Procedure Act of 1946 carried this work forward and, in addition, dealt with many other phases of rule-making, adjudication, judicial review, and related matters.

But, in the ten years which followed the passage of the Administrative Procedure Act, the movement for improvement of the administrative process continued to develop strength.

Many proposals have been made in the past decade by the

President's Conference on Administrative Procedure, by the Task Force on Legal Services and Procedures of the so-called second Hoover Commission, and, in 1956, by the American Bar Association. Proposals have also been made whereby the Congress would be called upon to take a permanent part in reviewing the activities of the administrative agencies. Also, in recent times, the Congress itself has manifested a genuine interest in the functioning of the federal agencies.

The mere statement of these events makes it manifest that changes in the future are to be expected in the procedural aspects of the administrative process. If history has shown us anything, it proves that change will continue to be a chief characteristic of that process for a long time to come.

No one person or group can realistically expect that all of its views will be adopted in making these changes. But I believe, firmly, that it is the duty of every person to support the changes in which he believes.

The American Bar Association has adopted a broad and comprehensive program and has shown that it is determined to present its views to the Congress. No group in the country is more concerned with these matters than the American Bar Association, and I think that the result of the efforts of the Association will surely be that the Congress will be better informed when it comes to grapple with the legislative solutions which have been proposed to many of these problems.

I hope that the pendency of various legislative proposals to improve the administrative process will not prevent the movement to improve administrative procedure by means other than by legislation. Many of the agencies themselves have voluntarily taken action to improve their procedures. The President's Conference on Administrative Procedure made many recommendations for such voluntary methods of improvement, and it is gratifying to note that such recommendations have not gone unheeded.

In the meantime, as lawyers interested in the administrative process, you can do no better than to gather together at meetings such as this Institute to discuss the practical problems that confront the government and private legal representatives before federal agencies. Such meeetings will promote understanding—intelligent understanding of the problems concerned lies at the root of their solutions.

VII

I would like to make a final observation concerning the administrative process which, to me, is most important of all. It relates to the persons selected to operate the federal administrative agencies. We shall go a long way towards correcting many of the problems which exist if we select able persons to carry out the administrative functions of the government. If I had to choose between a good man and a bad system and a bad man and a good system, I would unhesitatingly choose the good man and the bad system.

The stout heart of a highly qualified person in most important of all.

Over the years I think that, for the most part, we have been most fortunate in choosing individuals of a high type to operate our administrative agencies, and we should all do our utmost to see that this continues to be true.

I am reminded of what President Washington said in a letter to Edmond Randolph asking him to accept the position of Attorney General. He wrote:

> The selection of the fittest characters to expound the laws, and dispense justice, has been the invariable object of my anxious concern. I mean not to flatter when I say that considerations like these have ruled in the nomination of the Attorney General of the United States, and that my private wishes would be highly gratified by your acceptance.

Let us continue to select the "fittest characters" for our federal agencies.

I. ASSISTANCE AVAILABLE TO THE PUBLIC FROM GOVERNMENT AGENCIES

INTRODUCTION

By Thomas G. Meeker, *Moderator,*
General Counsel, Securities and Exchange Commission

We are very happy today on behalf of the Section to welcome this distinguished panel from the government Bar and the private Bar to deal with a subject which is of great interest to all: how to get something done without a formal proceeding and how to get along with an administrative agency by getting information in advance of a possible run-in or altercation with the agency that may lead to formal proceedings.

We are trying to bring to you representatives of the various agencies, and in one instance a private practitioner before that agency and an important member of the Bar of that agency, to let you know in as simple and plain terms as possible how these government agencies try to keep the people informed through interpretive advice, how they try to handle complaints that are brought to them by you on behalf of private clients, and how on occasion in a private law suit you may call upon the resources of the federal government to advance the interests of your own client through agency participation *amicus curiae,* or even in some instances where they have mustered the facts, by way of intervention.

We are doing this agency by agency, and the order is merely selected at random and no priority given to any particular agency, as you will quickly recognize because I turn to the FTC first.

Judge Gwynne, Chairman of the FTC, has consented to be with us and to talk with you briefly about how it is done over there, and he will be followed, from the private practitioner point of view, by Jerrold Van Cise, who will move right in after the Judge finishes his remarks.

Our procedure will then be to take each of the agencies all the way through by that route, and then we will open the whole subject matter to questions from the floor or from the panel.

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE FEDERAL TRADE COMMISSION

By John W. Gwynne,
Chairman, Federal Trade Commission

At the Commission we regard as a very important part of our work the problem of interpretive advice and cooperation to solve the problems of industry.

It is rather interesting to note that the law which created the Federal Trade Commission makes no mention of that part of the work. Nevertheless, the background indicates that that was probably the fundamental reason why the Commission was created.

The thought was well expressed in statements made by President Woodrow Wilson and by the leaders in the House and Senate of both parties expressing their view that the Commission could perform a great function in offering a certain guidance to industry.

The principal methods can be named by which this guidance is meant to be furnished. The first and best known, of course, is the Trade Practice Conference. I regard that as extremely valuable, and I think it could be made more valuable in some respects. I know the Commission would be pleased to hear from you as to how you think the Trade Practice Conference program should be made of more value to industry generally.

Now in recent years the Commission has issued some guides. We began with the cigarette people, you will recall, and issued some guides which I think did a great deal to remove some of the objectionable advertising that the Commission had discovered.

We have had a little difficulty in connection with the filter program. The reason there is so much discrepancy in the advertising of filter cigarettes is that there is no standard test. No 36-inch yard, so to speak, by which all must be tested. We have had good cooperation from industry and from the public generally on that subject, and it is hoped that some test will be worked out that will solve many of these problems.

After that, we issued the guides for the tire industry, and I think they are worthwhile.

Recently we issued the guides against false advertising practices as they pertain to deceptive and misleading prices—I think probably nothing the Commission has done, at least since I have been

on the Commission, has been received by the public with greater interest. We have had a tremendous number of inquiries about them, and there is a great desire on the part of the public to see that those rules get to be generally known and generally observed.

Then we have the Division of Small Business which was set up some few years ago. Its general purpose is to afford a meeting place for business to come in and ask some specific question or seek the solution of some specific problem.

We try to carry that out pretty much through the Commission. For example, in the merger area we have established a merger clearance program. Anyone who is contemplating a merger may avail himself of it if he wishes to do so. In that event, he contacts the proper members of the Staff, gives such information as he cares to give, and if he desires it, the Commission will advise. We try to advise within a reasonably short space of time whether or not the Commission will take any action if, on the showing made, the merger were carried out.

There are also a number of publications to which I would make reference from which you get information about our work and about the laws we enforce. First and foremost, of course, as you know, are the decisions of the courts. There are also decisions by the Commission. The Commission now has issued 51 volumes of decisions. They have not been as valuable as they could have been had we kept up with a digest. That is one of the things we would like to do. We have tried to interest some private organizations in getting out a digest of the Federal Trade decisions, but so far, we have not had success. We hope some day to be able to present the lawyers with access to a digest which I think will be helpful in determining what the Commission has decided in past years.

Then, of course, there are the published rules and Commission policy that are available to anyone who wishes to write the Commission.

I want to assure you that we regard this whole subject of cooperation as a two-way street. We think that it is to our interests and to everyone's interest if the business people learn as much about the Commission as they can. And the other part, and even more important, is that the members of the Commission and the Staff learn as much as they can about the problems of industry so that we will not be handing down decisions as if from an ivory tower.

On the matter of cooperation, I think I can best illustrate what I mean by telling the story that is a favorite story of our Executive Director, Harry Babcock. I think you have heard this before, but don't mind if I tell it anyway will you?

According to Harry, at a boy scout meeting the scoutmaster was asking the scouts what good turn they had done during the day. Well, Jimmy said he helped an old lady across the street.

The scoutmaster said, "That's fine. That's good."

"Willy, what did you do?"

"Well," Willy said, "I helped Jimmy to take the old lady across the street."

The scoutmaster said, "That also is good, but what I can't understand is why did it take two of you to get the old lady across the street?"

Whereupon, Willy said, "Well, sir, the old lady didn't want to go across the street."

THE FEDERAL TRADE COMMISSION'S PROCEDURES FOR VOLUNTARY COMPLIANCE

By Jerrold G. Van Cise,
Vice Chairman, Anti-Trust Section, American Bar Association

The rules of the Federal Trade Commission provide that the regulatory functions of the Commission are to be exercised in two ways: informally through procedures designed to encourage voluntary compliance with the law, and formally, by adversary proceedings.

My assignment is to discuss how the Commission proceeds informally through procedures designed to encourage voluntary compliance, and I plan to discharge my assignment by discussing three voluntary procedures: first, those whereby the Staff of the Commission gives oral advice; second, those whereby the Staff gives written advice; and finally, the procedures by which the Commission itself issues a published ruling. First, let us take up the oral advice issued by the Staff.

The principal occasion on which the Staff will give oral advice is when someone is in trouble and is being investigated. The procedure at that time is very simple. The Rules of the Commission provide that a person being investigated is entitled to know the purpose and scope of the investigation. If you have a client who is

being investigated, you simply waltz up to the investigator and ask him what is wrong, and what do you think the client should do to correct that wrong.

If you are making that inquiry in good faith, and I stress that good faith element as Judge Gwynne has, either the investigator or one of his superiors will answer both questions.

This procedure, in my humble opinion, is one of the most effective and helpful of all of the procedures of the Commission. If you find that the oral advice given to you is unreasonable, and often it is, you politely tell the Staff you do not agree, and both of you prepare for a marathon litigation.

On the other hand, if you find it is either reasonable or palatable, you advise your client to comply just as quickly as possible with that advice, and then you sit down with the Staff and see if there is not some way in which you can dispose of the proceeding. It may be if it is a small matter and you have very promptly corrected the minor error, the Staff will drop the investigation right there. In other cases, it will insist at least upon a stipulation that you will "go and sin no more." Or if it is really a serious matter, they will then say, "We must have you nailed down to a consent order, but will work out the form of that order."

In other words, by this very simple procedure, by the willingness of the Commission Staff to tell you what is wrong and what they think should be done about it, very often a little talking at the outset will save a lot of talking later on at a trial.

Second, we have the written advice given by the Staff. The occasion when you are able to get written advice from the Staff of the Federal Trade Commission is when there is no pending investigation. Thus, if you have a merger, and you would like to know whether or not you will be sued, you go down to the Commission and ask them if this merger or other transaction in their opinion complies with the law. Or again, suppose you have had your lawsuit. You have an order, and if it is an order with respect to the Robinson-Patman Act, it merely says, "Don't violate the Robinson-Patman Act." Accordingly, you would like to know whether a proposed course of action will violate this order.

The procedure in getting a written opinion from the Staff is much more elaborate. You must make your application for advice in writing. You must supplement it with a memorandum of facts, so that the opinion is not merely an abstract generality, but is tied into specific representations.

Often you wish to supplement that with a memorandum of law. You have your conference with the Staff after they have had a time to study the material that you have submitted.

At times you bring your client down so that they can look at them and see that after all, his purpose is proper and he merely wants to comply with the law.

Usually after your conference the Staff has additional questions, and you supply the supplemental information. Once that is through, you then, if you have been acting in good faith, and once more I stress if you have been acting in good faith, the Staff of the Commission will give you a letter in writing signed either by the Secretary of the Commission or by someone in the general office, stating their opinion as to whether the proposed transaction is lawful.

In the case of the oral advice and in the case of the written advice, it is confidential unless you wish to disclose that advice to others.

You have the option. Neither of these procedures with respect to the advice are specifically written out in the rules. However, as I mentioned when you have an investigation, there is a reference to the Staff giving you their opinion as to purpose and effect.

In the rules you also have a provision if you wish to submit a merger, or if you wish to submit a report of compliance with an order, you may present those questions to the Staff. But actually, the process of giving advice is much broader than that.

Third, we have the published rulings by the Commission itself. The only occasion at which the Commission will officially act to give you written advice in a published form other than in an adversary position is when there is some industry-wide problem of sufficient importance to merit their action. The most widely known ruling of that nature is that to which Judge Gwynne has referred, the Trade Practice Conference rule, which is issued specifically as advice to industry.

The procedure there is even more elaborate than when you were dealing with the Staff. You file a written application giving a lot of facts. You have your conference with the Staff. Rules are then put in draft form. You have a public hearing at which anyone can attend, and raise their objections.

Often you have more than one public hearing. Finally, the rules

are published and the members of the industry are asked to sign an acceptance in which they agree to observe those rules.

The rules themselves are as broad as the industry. They cover every possible sin that the industry might commit vaguely relating to trade regulation.

The more recent experiment of the Commission is of a less ambitious and possibly of a more practical nature. These are so-called guides which are not issued officially as advice to industry, but rather as instructions to the Staff. But they are made known to industry so that you know the attitude of the Commission in determining when to sue.

They are limited to a specific type of practice. For example, recently you have had issued the guide as to deceptive pricing. The procedure here is very simple. The Commission may or may not consult others. It may issue it merely on its own. And the rules are very specific and very understandable because they are limited to one subject and the Commission goes thoroughly into that subject before they issue the particular set of guides.

But in both cases, whether the industry issues these very general rules of the specific guides, in either case the Anti-Trust Bar have found this advice to be very helpful in illuminating the rather narrow but certainly not very straight path to anti-trust compliance.

In closing, I have two specific points that I would like to make, as to getting advice from the Staff or from the Commission. First, it is a mistake to walk your problem in to a Commissioner. It is a mistake in the first place because you are dealing with the wrong person. Orderly procedure requires a busy Commissioner to refer problems of this nature at least initially to a member of the Staff for the Staff's recommendation. It is a mistake, in the second place, because you are assumed to know that the Commissioner will have to refer this problem initially to a member of the Staff, and if you go directly to a Commissioner in the first instance, you necessarily create the inference that you wish the Commissioner to prejudge the problem and instruct the Staff as to what his recommendation should be.

Walking a problem first in to a Commissioner's office may impress your client because you can show you know the Commissioner; but while it may impress the client, it may depress your chance of getting the advice you wish.

The other point which is also essential to stress: do not expect

that once you get advice, either from the Staff or from the Commission, that you have complete immunity from any anti-trust suit with respect to that advice. You do not. The only advice given by the Staff is given on the express condition that it is without prejudice. The written advice which is given by the Staff is given on the express condition in the letters that you get that it is not binding if new facts turn up, if new developments occur, or if the Commission should disagree. And the rules and guides issued by the Commission are expressly stated to be subejct to change if the Commission should change its mind.

This does not mean that this advice is not of very great value. If you receive this advice, you are in a better position to decide what to do. If you accept the advice, you are in a better position to avoid litigation as to what you do, the Staff or the Commission having committed themselves as to what their opinions at that time may be. And by complying with the advice, you are in a far better position to argue that if and when the Commission or the Staff should change its mind, you should be given an opportunity to put your house in order to comply with any changed advice, before you are hit with litigation.

In short, because this advice is helpful and does give substantial benefits to industry, I respectfully and most strongly recommend that industry use these informal procedures to obtain advice more often than they have in the past.

I cannot promise that the advice that you get will necessarily be palatable, but if you can swallow it, it will be very agreeable in the sense of not being disturbed except in rare instances by litigation, if you follow the prescription.

Accordingly, it is a pleasure to commend the Commission for its willingness not only to order business men to desist from defying the law, but also to assist business men in complying with the law.

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE SECURITIES AND EXCHANGE COMMISSION

By Edward N. Gadsby,
Chairman, Securities and Exchange Commission

In discussing the position of the Securities and Exchange Commission in regard to informal procedures, it is necessary first to draw a sharp distinction between two functions of the Commis-

sion: its quasi-judicial functions, including its enforcement activities, and the purely administrative functions of the Commission.

As to the first general class of proceedings in which the average lawyer is interested, there is relatively little opportunity for informal action, except that of course the Staff investigators will in some cases, at least, discuss with relative freedom with the interested parties its contentions and the lines along which the investigation is proceeding. After all, in most of these cases the damage has been done and the purpose of the Securities and Exchange Commission in taking action is either to stop further damage or to invoke sanctions for past violations of the law.

When the action is in the status of actual broker-dealer proceedings, or injunctive proceedings, you can expect to be treated as an adversary by the Staff and probably get about as little information out of them as you would out of the average adversary in an ordinary law suit.

Relative to the second branch of activities of the Securities and Exchange Commission, however, the situation is distinctly different. Since its inception, the Securities and Exchange Commission has placed great emphasis upon acquainting persons subject to its jurisdiction with the manner and means of complying with the statutes it administers, and this program has paid dividends over the years.

Generally speaking, most persons are interested in complying with the law, rather than attempting to violate or evade it. With this in mind, the Commission freely offers interpretive advice to the public and to private practitioners in particular for the purpose of facilitating the lawyer's practice before the agency.

We recognize that the statutes which we administer deal with relatively complex matters and problems. While we attempt by our formal rules and regulations to provide a guide to the lawyer, interpretative problems necessarily arise whenever you are dealing with words.

Even persons specialized in the securities field find it necessary from time to time to consult with our staff for the purpose of solving new problems.

We encourage any inquiries of this nature, since we feel that they serve to prevent violations of the law and so simplify our own work, as well as helping the public.

The procedures for obtaining advice are very informal. As I am sure most of you know, inquiries may be made by telephone,

mail or personal visit. With respect to most problems, interpretative advice can be obtained in the Commission's several regional and branch offices throughout the country. If a problem is presented which the regional office cannot handle, it will obtain the necessary advice from the Headquarters Office for the inquirer.

Direct inquiry may also be made to the Home Office, where each division of the Commission has staff attorneys who render advice concerning the statutes administered by it.

I am sure all of you are aware that the Commission is responsible for the administration and enforcement of six basic statutes, namely, the Securities Act of 1933; the Securities Exchange Act of 1934; the Public Utility Holding Company Act of 1935; the Trust Indenture Act of 1939; the Investment Company Act of 1940; and the Investment Advisers Act of 1940.

It also has certain advisory functions under Chapter X of the Bankruptcy Law, the so-called Chandler Act.

If you have a problem falling under one or more of these statutes, you may obtain an opinion with respect to any particular problems involved by presenting an adequate statement of the facts of the matter to the Commission's staff. Our only requirement is that we insist on receiving all of the facts, including the name of the corporation or individual involved. This is so because we cannot give interpretative advice on hypothetical situations. In order that we may properly rule on such matters, we ask that wherever possible the matter be submitted by letter.

Depending upon the complexity of the problem presented, it may be desirable to arrange an appointment with a member of our staff to discuss your problem informally prior to submitting the full statement of facts for determination.

While we insist on full disclosure of all the facts to protect persons and lawyers who seek such advice, our policy is to treat such inquiries and our responses as confidential, and we have in the past successfully resisted attempts to subpoena such material. We did it in one case in the Southern District of New York, in *Pergamente* v. *Frazer,* Civil Action No. M8-85 (1950).

Whenever the Commission believes it is desirable to publish certain interpretations because of their general importance to the industry and the bar, we are careful to delete the names and other identifying information prior to publication. In this connection I wish to emphasize that the Commission's quasi-judicial opinions, as distinguished from these administrative interpretations, are

matters of public record and are always published so that they will be available to the public and practitioners.

While interpretations rendered by our staff are not to be deemed opinions of the Commission, they do represent the considered judgment of responsible staff members familiar with the various statutes and rules involved. Such opinions, of course, are not binding upon the courts, nor for that matter are the opinions issued by the Commission. However, an administrative agency's consistent construction of the statutes administered by it is given great weight by the courts and even greater weight with respect to its own rules when court litigation does ensue. We at the Commission are very proud of this interpretative service which, in 1955, the Hoover Commission characterized as "an excellent practice * * * most effectively used."

Many of the proceedings which come before the Commission are initiated by the filing of certain forms, such as registration statements and prospectuses, Regulation A notifications and offering circulars, and broker-dealer applications. There are special forms designed to fit special situations and forms which persons coming under our jurisdiction are required to file with us.

While, of course, the staff carefully avoids any appearance of drafting these papers on behalf of the inquirer, it is always available, first to discuss with anyone the proper form which should be used in a given situation, and second, to discuss the extent of the material required to be included in the form. Especially helpful are pre-filing conferences in connection with registration of securities under the 1933 Act. Such conferences very often serve to avoid problems which, if not cleared up in advance, might delay the effective date of the registration statement.

I should also mention the so-called "no action" letter which is sometimes rendered by the staff in lieu of a requested interpretation. While this letter has no binding effect and is of limited legal significance, we have found that the bar regards it as an important and useful device.

In substance, the "no action" letter is a statement by the staff that, on the facts as presented to them, they will not recommend action to the Commission if the attorney proceeds on his construction that the statutes do not prohibit his planned course of action. Such a letter will generally be issued where the questions of fact or law are exceedingly close and the staff does not wish to express a definitive opinion.

On occasion the public or private practitioners may wish to complain to the Commission concerning actions or transactions which they believe to be in violation of the statutes or rules administered by the Commission. We, of course, welcome any complaints although the Commission, like other federal administrative agencies, is entrusted with full discretion in determining what action, if any, should be taken with respect to them.

The Commission may decline to take any action because it believes no violation has occurred or that action is not warranted in the particular circumstances for other administrative reasons. Failure of the Commission to act, however, does not prohibit the complainant himself from instituting a private lawsuit if he so desires.

Incidentally, the courts have held that the Commission's exercise of its discretion in this regard is not reviewable. It could not be otherwise for the courts are not in a position to weigh the various discretionary factors which must be considered in determining whether the facts in a particular situation warrant bringing into play the full force of the federal government through the administrative agency involved.

Finally, I want to say just a few words about *amicus curiae* participation by the Commission. Frequently, issues involved in private lawsuits are important because of their impact upon the Commission's own administration of the statutes involved.

Accordingly, where appropriate, the Commission will file *amicus curiae* memoranda or briefs and on occasion participate in oral arguments. The purpose of such participation is not to aid a particular party but rather solely to assist the courts to arrive at what the Commission deems to be a proper construction of the statute.

Private practitioners frequently request the Commission to participate in actions in which they are involved. The answer of the Commission in any situation, however, will not depend upon the request of the party, but rather upon whether we believe that the question presented as to the construction of the statute is sufficiently important to warrant our participation.

We welcome being informed of pending litigation involving statutes we administer so that we may be aware of cases in which we may desire to participate as *amicus*. As a matter of general policy where we do participate, we avoid becoming involved in any factual disputes or any legal questions not pertaining to or

affecting the administration of the statutes. However, if a court requests us to assist as *amicus,* we may brief questions not directly involved in our administration of the securities laws, such as questions relating to the private civil recovery provisions of the federal securities laws.

In conclusion, I wish to assure you that the Commission is most anxious to render whatever assistance it possibly can to all private practitioners who desire assistance on problems within its jurisdiction. The only consideration we expect is honest, candid and sincere requests intended to achieve compliance with the law.

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE FEDERAL POWER COMMISSION

By Jerome K. Kuykendall,
Chairman, Federal Power Commission

These topics that are being discussed this afternoon do not all apply to the Federal Power Commission. Since our work consists largely of rate making and of licensing or certificating, we do not have problems of identical nature to those which confront the SEC and the FTC. Rarely is a matter of possible criminal violation involved in matters which come before us, and generally when parties seek advice, interpretive or otherwise, they are only asking for suggestions as to how best they could present their case to us, whether it be for increased rates or a license, or a certificate of public convenience and necessity. So I do not believe that there is the field for interpretive rulings that exists in some of the other agencies.

There has been criticism made, however, of the Federal Power Commission, among other agencies, of not using the rule-making proceeding sufficiently in establishing policies, and relying solely on agency decisions.

The point has been made that it is difficult, in fact, impossible, to find out what the Commission's views are on many problems without reading the Commission's myriads of decisions.

Well, that is true, but that is true also of the courts and of judicial decisions. Personally, I do not believe that it is possible, or it is certainly not feasible for the Commission to endeavor to codify interpretive rulings applying to the various statutes which

it administers. I do recall that in 1954, shortly after the Supreme Court in the *Phillips Petroleum Company* case had held that the Commission had jurisdiction over the independent producers of natural gas, that we instigated a rule-making proceeding designated R-142 to seek suggestions as to how best the producers' prices could be fixed. We were not sure when we started that proceeding that we would ever issue any rules or regulations in it, but we used that rule-making procedure as a vehicle to solicit suggestions.

A great number of people came forward with the best suggestions that they could make. But after considering them all, we felt that it was not possible to adopt any rule, and we finally dismissed the proceedings.

I will confess that since that date the progress we have made in solving that problem is not satisfactory to me, nor is it, I am sure, satisfactory to anyone. But I believe that if we had gone ahead and devised, then, the best rules we could, operating more or less in a vacuum, without actual facts of the case before us, that we would have done much more harm than good.

There is also the fact that the Natural Gas Act prescribes a "just and reasonable" standard for rates. Now out of that simple language has grown a well-understood method for fixing rates of pipeline companies. I am not mentioning producers in this same connection. That evolved through a series of cases and since that time every case has new facts, new angles to it, new little points to be decided. But I do not see how possibly all those little interpretations that have arisen one by one could have been made in advance. Many of them could never have been anticipated. I do believe that the best that can be done in that field by and large is to make our decisions available to everyone and provide an adequate digest for them.

Unfortunately, there are still blanks of two or three years in our printed decisions in bound volumes. We are fast catching up with that work and we intend to go ahead with a digest of it and it won't be too long before any lawyer can have available for himself all the reports of the Commission in an adequate digest.

I agree, as has been mentioned here, that that is imperative. I think one reason is that none of us want to have a bar practicing before an agency which in effect is a closed shop and is not open to those who have spent many, many years in the field. The information of what the Commission is doing and what it has done

in the way of decision making should be available for any lawyer to study. But I do not think that we could do as much as some people think we could do in the way of making interpretive decisions. I do agree, however, that the Commission's policies where they exist and where they are not expressed publicly in any form should be announced and made available for the guidance of industry.

I think it is just elementary that the better the industries understand the Commission's policies and its duties the easier it will be for the industry. But what I am concerned about is relaxing the work load of the Commission. When the industry is well advised as to what our policies are, we are spared a lot of trouble and consumption of time by inquiries, either oral or consultations with the staff or inquiries in writing.

Our policies with respect to *amicus curiae* participation are the same, apparently, as is that of the SEC. We have done so in some cases where we felt that an important matter of construction of the Commission's powers or duties was involved.

There, again, I do not believe those cases arise as frequently as in other agencies, whose fields are much broader than ours. After all, we are dealing only with two industries, the natural gas industry and the electric power industry.

The other little suggestions for discussion which are contained in our program by and large, as I said, do not apply to the Federal Power Commission, and I believe what I have said covers generally my views on those matters which are applicable to FPC.

A PRIVATE PRACTITIONER'S VIEW OF ASSISTANCE AVAILABLE TO THE PUBLIC FROM THE FEDERAL POWER COMMISSION

By J. David Mann, Jr.

Perhaps I can be most helpful by taking off on the theme announced at the opening of this session: in effect, how can we get something done without a formal proceeding? I would like to illustrate by pointing out something which has been done in connection with the practice before the Federal Power Commission, which it seems to me at least is proving to be most worthwhile and which I would commend to the attention of you ladies and gentlemen who are practitioners before that or other administrative

agencies. Recognizing as we all do that regardless of what agency you practice before, there are many improvements that can be made in the rules of practice and procedure, the Federal Power Bar Association, back in July, set up a symposium to consider possible changes in the Rules of Practice and Procedure.

This symposium was conducted under the very able leadership of Professor Leo Huard of Georgetown, was attended by various practitioners in the Bar Association, and it was very well attended by the Commissioners and Staff of the Federal Power Commission.

We had a very interesting two evening session, and out of it grew a report prepared by Professor Huard suggesting changes which could be made. Following that report, or while it was actually in the process of preparation the President of the Bar Association, with the assistance of Chairman Kuykendall of the Federal Power Commission, appointed a special working committee to consider revisions of these Rules of Practice and Procedure.

The Chairman designated several of the top representatives of the Commission's Staff. The President of the Bar Association selected various representatives of the several segments of particularly the gas industry to work together and that committee has been meeting every two or three weeks for several hours. Good progress is being made and I am sure that out of it will flow some very helpful and constructive suggestions for changes in the rules which should help us all.

I do not know whether a similar arrangement could be made in connection with other agencies. I sure feel that it might, and for those of you who feel a need for improvement in your rules of practice and procedure, I certainly commend it to your attention.

I would like to talk also about another matter which has not been touched upon here, except perhaps by those members of this panel who spoke with respect to the Federal Trade Commission.

The Federal Trade Commission, it would seem to me, though I have never practiced before that agency, unfortunately, has a delightfully informal and extremely constructive method of procedure. Such is not entirely true, as Chairman Kuykendall indicated, with the Federal Power Commission.

The things down there are handled much more formally and we do not have the opportunities for exchanges of views which

I feel are undoubtedly possible in connection with the Federal Trade Commission.

Some eleven years ago when I came to Washington and went to work for the Federal Power Commission, I worked for that agency for about three years, I noted many instances in which representatives of the industry would talk with members of the Commission or with the Commission as a group or with key members of its Staff and would work out various problems which confronted the industry and particular segments of it, and as near as I can see, those efforts were all very constructive. No one ever raised any severe criticism, and I believe that on the whole a great good resulted from those conferences.

You are all aware of the fact that in recent years, if not months, the Congress has become increasingly interested in activities of Federal regulatory agencies and has started looking down the necks and throats of these very able and highly public servants, and as a consequence, it seems to me that there has come about an increasing tendency to avoid any reference of any problem whatsoever to the Commission.

I think it is unfortunate and I wish it were otherwise. But on the other side of the coin, I would like to make this comment: people who are not as familiar with matters in Washington as perhaps most of us in this room are, are inclined to think that all you have to do to get something done in Washington is to know somebody who knows somebody where what you want done is to be done. They are inclined, intentionally or otherwise, to exert various pressures on those of us who practice before regulatory agencies to get these things done for them. And of course there are proper ways to do things and there are ways which are not entirely proper.

And I believe sincerely that it behooves all of us to be scrupulously careful in our dealings in matters of this sort, and to discourage clients, however well intentioned they may be, from seeking to influence or approach regulatory agencies in any way other than those ways which are prescribed by the rules.

It is easy to be led astray, and I think that we, as guardians of the administrative process, have got to do our very very best to preserve that process and to keep it from becoming corrupted.

Finally, I want to speak on another matter, which is one of very great concern to me. I think that the story about the two boy scouts helping the old lady across the street is very much in point

in connection with this particular matter. In this connection, I would liken the Federal Power Commission to the old lady and I do not know how many boy scouts we have, certainly more than two. But in any case, in connection with the *Phillips Petroleum* case, which thrust upon the Commission some 5,000 producers as new "natural gas companies" it seems to me the Commission was helped across the street most unwillingly. Nevertheless, it is across the street. It has got a tough job to do and one which takes many, many people to do. The Commission—I haven't checked any figures, though I'm sure our Chairman could put me straight on this—probably has on its staff now fewer people that it had back in 1947. Nevertheless, it is called upon to do a job which is many times greater than it ever had to do back in 1947, big though that job was.

I think that there may be times when we will be inclined to think that inaction or confusion in the regulatory scheme is desirable. But I believe that we must realize that in the long run it is not desirable. Any Commission to do its job well has got to have the people and money to do it.

I do not know what other agencies may be in this same boat, but speaking as one practitioner before the Federal Power Commission, I can say to you that that agency needs more money and more people to do a much bigger job. If we ever have any opportunity to help by going before the committees of Congress, I will say here and on the record that I would be willing to speak to that point before any committee of Congress.

Just one example of the situation which was brought out by the Chairman just now. We have no digest of cases. We have nothing to go to see what the Commission has done, what it is likely to do. So far as I know, they do not really have an adequate amount of money or an adequate staff to do the job. Perhaps it is well for those of us in the business that others cannot just come in and look at a book and know as much as we do. But again I think in the long-range best interests of the practice and certainly in the long-range best interests of orderly administration of the Natural Gas Acts and the Federal Power Act that the Federal Power Commission has got to be helped to get the tools it needs to do the job.

INTERPRETATIVE ADVICE AVAILABLE TO PRACTITIONERS AND THE PUBLIC, FROM THE INTERSTATE COMMERCE COMMISSION

By Everett Hutchinson,
Commissioner, Interstate Commerce Commission

The Interestate Commerce Commission provides certain assistance to the public, including practitioners. Within specialized fields members of the Commission's staff are available for interpretative advice to the public and to practitioners before the Commission. For example, in the Commission's Bureau of Accounts, Cost Finding, and Valuation, staff members give interpretations of the Commission's accounting classifications and other regulations when called upon. This advice is available from field accountants as well as those on the Washington staff of the Bureau.

Interpretations of the Commission's rules relating to the filing of rates and charges may be obtained from the Commission's Bureau of Traffic in Washington or from rate agents attached to the offices of the District Directors of the Bureau of Motor Carriers in the field. Field offices of the Bureau of Motor Carriers may be consulted for interpretation of the Commission's safety regulations and other regulations concerning transportation by motor vehicle. A small staff in the office of the Bureau of Motor Carriers here in Washington specializes in the interpretation of motor carrier operating rights. Important questions of interpretation are embodied in public administrative rulings issued by the Director of the Bureau of Motor Carriers.

The Secretary's Office, particularly the Section of Dockets, provides assistance in the interpretation of the Commission's General and Special Rules of Practice. In general, anyone having a question of interpretation may take it to the appropriate Bureau and if the Bureau can be of assistance it will supply the best advice it can give. It should be pointed out, however, that such interpretations represent the informal opinion of the individual making the interpretation.

If the person seeking an interpretation of an operating right, for example, does not agree with the interpretation, he is free to file a petition for a determination by the Commission. Likewise, if it is felt that the Director of the Bureau of Motor Carriers has erred in an administrative ruling, an appeal may be made by petition for reconsideration of the ruling.

Informal opinions, whether given by a member of the staff or by a Commissioner, are not binding upon the Commission, if the matter should later come before it for decision. In *Minneapolis R.R.* v. *Peoria Ry.*, 270 U.S. 580 the Court held that a telegram from a Commissioner stating his opinion that an order was in effect, "was without legal significance" *Id.* at 585. The fact that an opinion had been obtained and followed would, of course, be given great weight in determining whether the person had "knowingly and wilfully" violated the requirement and should be subjected to criminal penalties. And, the fact that a person had been given an opinion also may be considered in determining whether conduct contrary to the advice was a violation "knowingly" committed.

Although conduct in reliance upon such advice may, and ordinarily will, preclude the application of criminal penalties where the statute provides penalties for those knowingly and wilfully violating a requirement, it does not relieve the person from the requirement to comply, where the advice was incorrect, after the erroneous advice has been corrected or its erroneous nature has become known to the individual. It also does not relieve from civil liability to third persons. In *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, the Court held that the fact that the Secretary of the Commission returned an application with the advice that the matter was not subject to the jurisdiction of the Commission did not relieve the railroad of its obligations because "the Secretary of the Commission was without authority to bind the Commission in the matter." *Id.* at 145-46. (This was an action by one railroad against another to terminate a trackage agreement and for damages.)

The Commission has followed the course of allowing the giving of such informal opinions by its staff because, in most instances, the advice is accurate and helpful. The person seeking advice should understand, however, that he is getting only the opinion of the staff member and if the advice should prove to be erroneous, the person obtaining it may thereafter have to change his course of conduct and perhaps suffer financial loss. The fact that erroneous advice was given, even though contained in a formal declaratory decision, cannot operate, for example, to allow a person indefinitely to engage in an operation without being subject to the Act when his competitors are so subject. The public order and

the public interest must be deemed to supersede the private interest of the individual affected.

Section 5(d) of the Administrative Procedure Act provides:

> The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

The Commission has issued declaratory findings in some proceedings such as *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, and *Arizona Sand and Rock Co.* v. *Southern Pacific Co.,* 280 I.C.C. 285. The Commission's conclusions in *Determination of Exempted Agricultural Commodities,* 52 M.C.C. 511, was reviewed by the courts as a declaratory order under Section 5(d).

Administrative determinations have been made by the Commission concerning the lawfulness and applicability of motor carrier rates on past shipments. See *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M.C.C. 337. While the Commission's power to make administrative determinations of the reasonableness and lawfulness otherwise of tariff rates on past shipments is now under review in the Supreme Court, its power to determine the applicability of rates on past shipments seems well settled. Such determinations of applicability are accorded weight by the courts, but excepting matters within the doctrine of primary jurisdiction, the Commission's determination of applicability is not binding upon the courts.

With respect to complaints on behalf of clients, the Interstate Commerce Act, in various sections, authorizes the Commission to adjudicate complaints filed with it by any person, state board, organization, or body politic. The adjudication of such complaints usually follows, as a matter of course, but Section 204(c) and several other provisions of the Act state that, whenever the Commission is of the opinion that a complaint does not state reasonable grounds for investigation and action on its part, it may dismiss the complaint.

The Commission is also authorized to enter into investigations to determine whether persons have failed to comply with the provisions of the Act or with any requirement established under it. If the Commission, after notice and hearing, finds that the defendant in a complaint, or the respondent in an investigation, has failed to comply with any such provisions or requirements, an appropriate order may be issued to compel compliance. In addi-

tion, informal complaints may be filed, and the Commission will attempt, through informal procedures, to adjudicate such complaints without the taking of testimony.

Many instances are brought to the attention of the Commission of failures by those subject to its jurisdiction to observe the provisions of the Act and the Commission's rules. At the same time, violations of the Act and the Commission's rules are developed by the Commission's staff. In instances where it appears that the violation has been committed "knowingly" or "knowingly and wilfully" and the violation is of a substantial nature, the Commission proceeds with a request to the Department of Justice for a criminal prosecution to enforce the appropriate penalty provision of the Act. Where a violation is not knowing or wilful it may proceed by civil action to terminate the unlawful action unless voluntarily discontinued. The Commission also may institute a proceeding to determine whether a carrier's operating rights should be suspended or revoked.

Whether the Commission should institute criminal prosecution, civil action, a revocation proceeding, or attempt correction through informal administrative action, is dependent upon many factors. If the violation is of a substantial nature and in open disregard of the law or the Commission's regulations, usually a criminal prosecution is instituted. On the other hand, if it appears that it would be more in the public interest to terminate the violation promptly, such as the operation of a motor carrier without adequate insurance for the protection of the public, a civil action to restrain operations without insurance is considered more effective than an action for the imposition of a fine. Sometimes both remedies may be pursued. Where it appears that the violation is a result of ignorance, or honest mistake in the interpretation of the Act, an operating right, or a Commission regulation, an attempt is made to correct the violation through informal administrative process without resort to court action. Ignorance or mistake, however, is not always a valid excuse because a person who undertakes to be a carrier must inform himself of his duties and obligations.

In conclusion, I will say that with respect to intervention and participation *amicus curiae* in private litigation, the Commission is a party to most suits in which important questions are presented concerning the interpretation of the provisions of the Act and regulations promulgated thereunder. For that reason it has

not had to consider frequently whether to seek permission to intervene in court proceedings as *amicus curiae*. In making such a decision, however, it would seem appropriate to consider whether a novel question of interpretation is presented, and whether worthwhile assistance could be given by the Commission to the court by participation as *amicus curiae*. Occasionally, the Commission is requested by the court to file a brief *amicus* where the action, although between private parties, either has important consequences in its field or the subject is highly technical and the court desires assistance.

What I have said is intended merely to illustrate generally the type of assistance that is available to the public, including practitioners. No effort has been made to give an inclusive enumeration. Indeed, this could not be done within the limited time allotted.

INTERPRETATIVE ADVICE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE CIVIL AERONAUTICS BOARD

By Franklin M. Stone,
General Counsel, Civil Aeronautics Board

It would seem that "interpretative advice" should constitute a relatively small part of an agency's functions. Quite the opposite is true, however. The amount of advice given by the staff of a regulatory agency such as the Civil Aeronautics Board in the course of its day-to-day operations, whether classified as "interpretative" or by some other label, reaches very impressive proportions. My objective, in the limited time available, is to give you as clear an insight as possible into this subject as it pertains to the Civil Aeronautics Board.

The bulk of the advice of an interpretative nature rendered by the Board's staff originates with the office of General Counsel, and for that reason I think it will be helpful to discuss briefly the organization of the Office which I head. In a nutshell, the primary functions of the General Counsel are to act as legal advisor to the Board in the decisional process and to provide guidance to the Board and its staff on legal and related policy questions of fundamental importance and significance.

The Office of General Counsel is organized with three operating

divisions whose titles are meaningful in describing their functions. The Litigation and Research Division is primarily concerned with legal research, brief writing and representation of the Board in arguments before the courts; the Rules and Legislation Division is initially responsible for the drafting of the Board's rules and regulations, and the attorneys in this division also keep abreast of congressional activities which affect or are of interest to the Board, and prepare the Board's legislative program; and the Opinion Writing Division, as the name implies, receives the Board's instructions in decided cases and translates them into appropriate opinions and orders. In addition, we have attorneys called "Special Counsel" who are specialists in various aspects of the Board's work-routes, rates, carrier relations questions, and international problems.

It is thus apparent that the legal activities of my office run the entire gamut of the Board's regulatory responsibilities, and requests for advice which are received may fall into any of these areas. Let me illustrate with a typical example: Carrier A directs a letter to the General Counsel, stating that it contemplates the purchase of 5 aircraft from Carrier B, and requests advice on whether such a transaction would constitute the purchase of a "substantial part" of the properties of Carrier B within the meaning of Section 408 of the Civil Aeronautics Act so as to be unlawful without prior approval of the Board. Assuming that the circumstances are such that informal advice may appropriately be rendered, a reply letter is prepared which sets forth the views of the General Counsel. We are careful to point out on each such occasion that the position expressed is that of the staff and does not necessarily represent the views of the Board. In this way the recipient obtains the benefit of staff thinking on his problem while, at the same time, the necessary freedom of action on the Board's part is preserved.

With this introduction to the topic under discussion, I would like to pass along to a consideration of particular aspects of the problem.

How To Present the Problem

Requests for interpretative advice are presented to the Board and its staff by virtually every conceivable method of communication—formally, by petition or motion; informally, by conference, telephone, telegraph or letter.

Informal requests are by far the most frequent type and perhaps the most relevant to the present discussion. The preferable method for presentation to our staff is by letter, which sets forth the pertinent facts in detail. All too often written requests are factually incomplete, which leads to protracted correspondence that is unnecessarily wasteful of the time of the inquirer and the staff. We insist on full disclosure of the facts because, as in the example I gave you, they may be decisive of the legal question involved. Also, insistence on the facts serves the purpose of discouraging purely hypothetical inquiries and very often is a guarantee of the sincerity on the part of the person making the request.

As I have indicated, requests are not limited to those made by letter; nor are all such requests handled by the Office of General Counsel. For example, the Bureau of Air Operations, which is the staff unit dealing with economic policy questions, is authorized to issue written advisory opinions to prospective charter groups concerning their eligibility to participate in charters under the Board's Transatlantic Charter Policy; the staff of the Office of Carrier Accounts and Statistics issues accounting and reporting interpretation and standard practice letters for the guidance of the industry; and the Board on occasion issues formal interpretations of its regulations, either upon petition or its own initiative.

Care should be taken to differentiate between requests for interpretative advice and complaints of private parties. Interested persons often write in complaining of a carrier's service or some action on its part deemed to be unlawful. These complaints are normally handled informally by correspondence through the Informal Complaints Section of the Board's Office of Compliance, but may result in formal compliance action in aggravated cases. In the case of formal complaints by private parties, the Civil Aeronautics Act makes it the Board's duty to investigate such complaints where there shall appear to be reasonable ground for such investigation, Section 1002, 49 U.S.C. § 642. The statutory language relating specifically to unfair competition complaints is that the Board may institute investigations if it considers them in the public interest, Section 411, 49 U.S.C. § 491.

Investigations, once instituted, are formal proceedings in which the decision is made upon an evidentiary record. Private parties thus can compel Board enforcement action if their complaints demonstrate reasonable ground, or public interest, requiring the institution of an investigation. While the determination of what

constitutes reasonable ground or public interest involves an element of discretion, it may be that abuse thereof would be judicially reviewable. For separation-of-functions considerations, Section 5(c) of the Administrative Procedure Act, the Board has delegated power to make this determination to the Chief of its Office of Compliance, subject, in the case of his refusal to institute a formal proceeding, to review by the Board upon motion of the complainant, or upon the Board's own initiative. 14 C.F.R. 1957 SUPP., 302.204, 302.205.

Extent of Interpretative Rulings

I mentioned at the outset that the problem of requests for interpretative advice is a much greater one than might be supposed. I have some statistics as of September, 1958, which will be of interest to you and which illustrate my point:

We estimate, on a fair sampling basis, that about 1200 letters have been written in the past 5 years which involved interpretation of legislation and regulations pertinent to the Board's responsibilities. However, only about one-third of these letters went to the "industry." The majority of inquiries are from users of airline services, interested government agencies, investors, labor unions, etc. Advice furnished orally runs higher than that. It should be kept in mind in this connection that, as I have pointed out, the principal job of the General Counsel's Office in the interpretative field is to furnish legal advice to the Board and its staff in the several operating divisions. Some of this advice directly or indirectly serves as the basis for the greater volume of legal advice which the operating staff renders in its day-to-day contact with the industry and other interested persons.

To finish the statistics: since May, 1955, when the Bureau of Air Operations first started issuing advisory rulings on charter eligibility, about 15 written letter opinions have been issued by the Bureau. In addition, on approximately 50 occasions, after conferences, oral advice has been given to prospective chartering groups, who have not requested written opinions primarily because their charter plans had not solidified. Further, in the past 5 years 33 interpretation letters and 24 standard practice letters have been issued by the staff of the Office of Carrier Accounts and Statistics.

Confidential Treatment of Inquiries

Ordinarily it is our practice to treat informal inquiries, whether written or oral, as confidential. Normally, confidential treatment is justified and desirable for many reasons, not the least of which are (1) the fact that the inquiry involves important disclosures concerning business or competitive relationships that would be severely damaged by publication under circumstances where there are no overriding public interest considerations requiring public release; and (2) confidentiality encourages the freedom of discussion necessary to successful resolution of problems. Some types of informal advice given, particularly on matters of general importance, are published for the information of the industry and the bar generally, and on occasion advice rendered on a particular problem is released upon request on an *ad hoc* basis. In the case of formal proceedings or formal submissions to the Board, all such material is a matter of public record unless confidential treatment is ordered pursuant to provisions of the Act, Sections 1001, 1104 or the Board's regulations. 14 C.F.R. 302.39.

Effect of Interpretative Rulings

It is clear that informal interpretative advice rendered by the staff is no more than the considered judgment of responsible staff officials given on the basis of the facts as represented, and it has no binding effect on subsequent agency action or in proceedings between private parties. The Board has at no time felt itself compelled to follow the legal advice given by its staff to outside persons regardless of its validity, although I am not aware of any instances where the Board has found it necessary to overrule the staff's advice. The record of the staff in this area is based largely on careful work and a scrupulous avoidance of lulling outsiders into a false sense of security with respect to seriously controversial points of law which only the Board and the courts can finally resolve. In all such instances, we furnish all aids to interpretation at our command, and in some situations we might even indicate the staff's thinking on the problem, but in all events we make it clear that the Board is not bound and the ultimate risk of reliance is upon the inquirer.

The fact that advice rendered by officials or employees of an agency, as opposed to the agency itself, does not work any kind of estoppel on the agency is a well-established principle. I can per-

haps best illustrate the point by reference to the case of *Pacific Northern Airlines* v. *Alaska Airlines,* 80 F. Supp. 607 (D. Alaska 1948). In that case, one air carrier sought an injunction to restrain allegedly unlawful operations by another. The defending carrier asserted, among other things, that its president was led to believe through conversations with a member of the Civil Aeronautics Board that operations of the type it was conducting were within the scope of its authority. In disposing of this contention, the court stated:

> * * * such a declaration, even if made by a member of the Board, is not binding on the Board and certainly cannot influence the decision of the Court. *Id.* at 607.

This is not to say that the fact that informal staff advice has been obtained may not prove of importance in some situations. Its greatest value is that it provides to responsible persons the greatest possible assurance, short of agency determination, that their operations are being conducted properly. Further, conceivably in some circumstances prior resort to the agency staff may have some bearing on the necessity for enforcement action, the wilfulness of particular violations, or in the determination of the appropriate sanction to be imposed in the event that subsequent agency action is necessary.

Declaratory Judgments

The Board has issued declaratory orders pursuant to Section 205(a) of the Civil Aeronautics Act and Section 5(d) of the Administrative Procedure Act. Of the relatively few such orders issued, most were in response to requests for declarations that certain provisions of the Act were not applicable to a given transaction which would otherwise require approval, and usually approval of the transaction was requested in case the Board found that the law applied to it. A good example would be transactions which may be subject to Board approval under Section 408 of the Act, where the petitioner seeks a disclaimer of jurisdiction or Board approval of the transaction. While the Board recognizes the potential value of a provision for declaratory judgments, its experience with it has been so limited to date that no further significant evaluation can be made.

Public Availability of Legislative Rulings

The "legislative" rulings of the Board are its substantive and procedural rules and regulations, all of which are published and codified in Chapter I, Title 14 of the *Code of Federal Regulations.* Complete lists of the parts of the Board's regulations, and amendments thereto, are available through the Board's Publications Section.

The Board makes every effort to assure the widest possible dissemination of its rules and regulations upon adoption and release. The CAB method of making its regulations and rules accessible to the public, and press, is as follows:

1. At time of release CAB Office of Information personnel place copies of all types of CAB informational material, including regulations and rules, and CAB Press Releases summarizing and interpreting the Board's action or decision, on the press table in the CAB Press Room, Rm. 5040 with additional copies in the OI, Rm. 5036, Commerce Building, Washington 25, D. C. Such material is available for free pick-up by the public, and press representatives, during CAB business hours.

2. Simultaneously CAB informational material is placed in specifically identified open-slot, wall mail boxes in the CAB Press Room for the national news wire services, selected metropolitan dailies, and aviation trade publications.

3. The OI Staff also notifies the press by telephone of the immediate availability of most informational material and answers public and press questions on the subject and provides pertinent background information as requested.

4. At release time the OI also send 100 copies of most Press Releases up to the News Rack at the National Press Club in order to obtain the widest possible dissemination of a Board action among a concentration of news media representatives.

5. The CAB Publications Section at Release time also initiates the mailing of such informational material to persons and organizations that have requested information on Board actions in specific categories: *i.e.,* the CAB Press Release mailing list services more than 500 newsmen and publications outside of Washington, D. C. There is also a mailing list for rule-making proposals and rules. The special CAB mailing lists are kept up-to-date on an annual basis.

6. The CAB Minutes Section, following Board or Bureau action in issuing rule-making proposals or final regulations, transmits

the material to the *Federal Register* for publication as required by the Administrative Procedure Act.

In conclusion, may I say that the subject of "Interpretative Advice" is one that well might be given a great deal more thought by the Bar Associations and the agencies. Preliminary to preparing my comments for presentation today, I contacted several administrative agencies. The responses received clearly demonstrate there is no uniformity among the agencies with respect to many facets of this subject matter.

Obviously this situation is bewildering and frustrating to the average practitioner who is sincerely attempting to serve the best interests of his client. Of course, each agency has different problems, and policy determinations are made on the basis of the organizations, responsibilities and nature of the work of the particular agency. But I believe that some action can be taken that will simplify the problems of the practitioners in the regulatory field.

It makes sense to me for agencies to cooperate as fully as possible, within the limits of judicial fairness and the limitations of available staff, to avoid relatively simple problems becoming complex. Proper advice at the proper time will avoid wasted time, protracted correspondence, needless expense and unnecessary headaches to all concerned.

You may be assured that the Civil Aeronautics Board desires to be helpful. My office will cooperate so long as practitioners do their part and do not expect us to perform services that are the primary responsibility of the practitioner himself, or some other agency.

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE FEDERAL COMMUNICATIONS COMMISSION

By Arthur W. Scharfeld

I

After approximately 30 years of practice before and against the Federal Communications Commission and its predecessor, the Radio Commission, I find myself now cast in a new and dual role: first that of pinning a bouquet upon the Commission for its accomplishments in lending assistance to the public, and second,

that I shall be expected to express the viewpoint of the Commission as well as that of the private practitioner.

Fortunately, I believe that they coincide on this subject with one exception which I will indicate later.

While this dual statuts is somewhat novel, I find myself in honor bound to inform you that the Commission approaches the academic ideal in relation to the subject under discussion this afternoon. My high regard for the assistance rendered by the Commission to the public has its source in two facts: first, the Gargantuan nature of the task which confronts this small, but vitally important agency with a small budget; and second, the fine quality of the services of the Commission in this field of affording assistance to the public and practitioners before it.

Let me sketch for you the facts which make the Commission's task so truly Gargantuan since I believe, there are few people who understand the nature and complexity of the subject matter with which the Commission is concerned. In fact, I learned a great deal about it by making certain inquiries which I would not have made had I not been participating on the panel.

The Federal Communications Commission was created by the Communications Act of 1934:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, * * *. 47 U.S.C. § 151.

Under the provisions of the Act implementing these purposes, the FCC has established a Safety and Special Radio Services Bureau, which regulates radio communications for the functions implied by *these* terms: marine, aviation, police, fire, forestry, highway maintenance, state guard, power, petroleum, industrial, business, relay press, agriculture, radiolocation, forest products, railroad, motor carrier, taxicab, automobile emergency, amateur, disaster communications, and citizens services. In Fiscal Year 1957, the Bureau received more than *186,000 applications*. The Commission has a Common Carrier Bureau which regulates the multibillion dollar interstate and foreign telephone and telegraph industry. In Fiscal Year 1957, the Bureau received 6,300 appli-

cations. The Commission has a Broadcast Bureau to regulate standard broadcasting, FM broadcasting, and television broadcasting and these are the activities most impressed on the public mind. In Fiscal Year 1957, the Bureau received more than 9,700 applications. And the Commission has a Field Engineering and Monitoring Bureau with offices in Washington and 23 other locations to perform a variety of field engineering functions, including station inspections, signal measurement and investigation, enforcement, and issuance of commercial operators' permits.

It is clear, then, that there were well over 200,000 points of contact between the FCC and members of the public in Fiscal Year 1957 with respect to formal applications for various types of authorizations in many different fields of activity.

A few other facts and figures help to show the tremendous amount of direct and indirect contact between the FCC and the public. I am informed that there are now 2,100,000 radio authorizations, and 1½ million authorized radio transmitters. In the field of telephone and telegraph, in the year 1957, Western Union handled over 150,000,000 domestic messages; almost a quarter of a *billion* telephone calls were made *daily*.

I have taken the time to tell you these very sketchy, but extremely impressive, facts, to indicate the vast potential of complaints and requests for assistance which must inevitably come to the FCC—from the public, whose children are assisted into the world by doctors called on radio paging services, and whose funerals, even, are directed by radio communications. The complaints to the Commission range from $5.00 long-distance telephone calls to complain of a 10-cent overcharge by a carrier, to allegations of the most serious transgressions of law. The requests for assistance range from a letter from a small schoolboy asking for help in writing an essay on the FCC, to requests for assistance in industry-wide research on the propagation of radio waves.

From members of the public, from industry, from officials of municipal, state, and federal governments, from lawyers, from engineers, and from the persons regulated by the Commission, there come in the form of telephone calls, letters, telegrams, and personal conferences, thousands upon thousands of complaints and requests for assistance each year.

And now, what is called in show business, "the punch line." These complaints and requests for assistance are handled by the Commission's *total* staff of 1200 persons. I repeat, the *total* staff

of 1200 persons—which includes the messengers, the business machine operators, the secretaries, and the housekeeping workers who are not directly engaged in administrative contact with the public. Against this background of fact, it is no wonder that the Commission's staff-members who come in contact with the public and its representatives are regarded, by those who know them, with respect, appreciation, and affection.

II

Now I should like to look at the assistance available to the public from the Commission in the frame-work of the outline of our subject this afternoon. Of all the detailed subjects the one which reads, "staff level advice on proposed courses of action and other informal staff clearances," is by far the most important in FCC operation. It is most important because there are more requests from the public for help in this area than in any other area; it is most important because such staff advice expedites the affairs of the public immeasurably; it is most important because staff action in this area, though costly in terms of man-hours, saves even more man-hours by heading off inept demands and requests by the public which would lead to wasteful communication with the Commission; and it is most important because the Commission is reluctant to give formal declaratory rulings generally.

There is not much profit in our dwelling on the large volume of rather ingenuous requests for assistance submitted by the public. It is enough to say that the Office of Reports and Information distributes a number of information bulletins and documents attractively and simply written to provide general answers to general questions.

The more interesting subject for us is the relationship between staff and relatively sophisticated people in the field of communications, including lawyers, engineers, and business executives. The need of these knowledgeable people for assistance from the staff derives from the fact that there is a large body of effective administrative law and policy which finds expression only in uncodified and unpublished actions of the FCC in specific matters. I think it is not necessary to belabor the point that no published administrative rules, regulations, standards, or general statements of policy can possibly anticipate definitively the infinite variety of problems which come before administrative agencies like the FCC.

I should like to make this point clear: under the Commission's Rules, virtually all actions and correspondence on *ad hoc* problems are required to be placed in files open to the public in various reference rooms. Consequently, if there were or reasonably could be an index to all the dispositions of specific pocedural and substantive problems considered and decided by the Commission, the great need of the public and its representatives for staff assistance could be substantially reduced. However, the volume of *ad hoc* actions is simply too overwhelming to permit the existence of such an indexing system.

The very valuable assistance most often supplied by the FCC staff is the direct and indirect referral by staff members to dispositions by the FCC of fairly recent and comparable problems. Thus, a staff-member often says, "XYZ had the same problem not long ago. Take a look at the file." Or, he says, "This is what we did with XYZ in the same circumstances: * * *." When there have been a great many similar resolved problems, or when the staff-member has forgotten the name of the party with a similar problem—but is sure of the result—the staff-member may omit reference to other specific actions and simply say, "This is what you should do * * *." Clearly, this type of assistance from the staff is not only invaluable, but there is no substitute for it.

The scheme of things just described does not, of course, cover the situation when new problems of policy and administration arise. In new situations, staff-members are properly cautious in expressing opinions. When they do so, they make it clear that they are simply trying to help by discussing the new matter in detail, and that any opinion they express is a personal guess or prediction and cannot be relied upon as an expression of Commission policy.

Generally speaking, there is no significant difference between securing staff advice orally or in writing, except that written communications take longer, and oral discussions are often more productive than two written monologues. From time to time, however, the staff will strongly recommend or insist upon the filing of a letter posing the question for several reasons: (1) to be sure of securing an accurate statement of the pertinent facts; (2) to prevent misinterpretation of any advice given; and (3) to have a statement of the problem in convenient form for referral to other staff-members.

III

In providing assistance to the public and its representatives, the FCC has adhered to an over-all policy of informality. Basically, as you can see from the facts and figures with which I began my remarks, the emphasis on informality rather than upon formal proceedings has resulted from the great workload of the Commission and the slowness of formal proceedings leading to such declaratory orders as those provided for in Section 5(d) of the Administrative Procedure Act as interpreted by the Commission. Incidentally, the legislative history of the 1952 amendments to the Communications Act indicates strongly that, in the minds of at least some legislators, the declaratory orders contemplated by Section 5(d) of the APA do not involve a formidable and excessively formal proceeding.

Even in the field of complaints involving common carriers under specific procedures provided in Title II of the Communications Act, the staff has largely succeeded in replacing formal proceedings with successful informal dispositions to the benefit of all concerned.

There is also a general impression among practitioners, and perhaps among staff members, that the Commission desires to avoid even such declaratory rulings as those obtainable from the Internal Revenue Service (without the procedure which *may* be necessary under Section 5(d) of the APA) because (1) a great deal of staff time would be required to prepare careful rulings, and (2) individual cases differ so greatly that rulings would not be of substantial value to the public.

The public is well served by the informal technique of staff consultation except in the field of broadcasting, where it is impossible to secure meaningful assistance in the field of programming. If I may now be permitted a critical word—after my earlier strongly complimentary expressions—it is my opinion that the Commission cannot offer assistance to the public in the field of programming because it is unsure of its own powers and policy in the field. While the Commission asserts some authority and considers programming in connection with its licensing of broadcast stations, it has never established a factual basis for such policy as it has expressed in decisions and in purely administrative actions. To be fair, I must say that the Commission meets criticism such as mine by stating that programming is primarily a matter

of license responsibility; however, the Commission nevertheless engages in judgments on programming which have no discernible legal or factual basis.

IV

I shall make brief reference to the one remaining portion of the outline of our subject this afternoon; namely, intervention and participation *amicus curiae* by the FCC in private litigation. This is not an important aspect of the Commission's activities because of the infrequent occurrence of litigation between private parties in which the Commission might have an interest. However, on the average of once, in perhaps, two years, a case will arise in which the Commission intervenes—itself or through the Department of Justice. When it does so, the Commission is motivated by a desire (1) to persuade the courts to interpret the Communications Act and the Commission's actions in what the Commission regards as the proper manner, (2) to be sure that the facts relating to Commission action in the case are properly stated and properly understood by the court; and (3) to secure "proper" clarification of the provisions of the Communications Act.

I conclude as I began by saying that, except for the single exception which I have mentioned, the FCC has done a fine job of providing assistance to the public and private practitioners.

ASSISTANCE AVAILABLE TO THE PUBLIC, INCLUDING PRIVATE PRACTITIONERS, FROM THE DEPARTMENT OF AGRICULTURE

By Charles W. Bucy,

Assistant General Counsel, Department of Agriculture

I feel somewhat lost here among all these independent regulatory commissions and boards, and I am sure that a great many of you people wonder why Agriculture is here.

To give you some idea, I will quote from the Hoover Commission's report on agricultural activity:

> The Department of Agriculture is one of the largest regulatory agencies in the Federal Government. It administers the greatest number of regulatory acts of any Federal agency, acts which vary widely in subject matter, administrative and enforcement procedure.

In addition to the regulatory activities of the Department, of course we run the biggest merchandising business in the world with respect to agricultural commodities through the Commodity Credit Corporation in connection with support price programs and other programs of that nature, as well as a substantial loaning operation through the REA for electrical country telephones and power, and the Farmer's Home to finance the individual farmers. Our programs have an impact on every farmer in the country, surely, and practically every handler or merchandiser of agricultural commodities.

In the regulatory field, we administer some 50-odd regulatory acts. Because of the reasons that have been outlined here with respect to interpretations that may be furnished to members of the industry or attorneys not being binding as an estoppel upon the agency, the Department has, to the extent possible, indulged in interpretive rules and statements of policies published in the *Federal Register.*

As a result, you will find if you will refer to the Code of Federal Regulations that the Department's substantive procedural and interpretive regulations cover some 6800 pages.

I think it is far in excess of any other agency of the government. I think that one problem that arises is a failure on the part of the Bar and some of the industry to appreciate fully the fact that the agencies charged with regulatory activities and other administrative activities affecting the public, realize to the fullest extent that if their job is to be accomplished, they must obtain a minimum of 95 per cent compliance through education, information and, if necessary, warnings to members of the industry.

The Department of Agriculture has had for a long time a procedure whereby any time that an individual finds himself being investigated, that he may get in touch with the proper official of the Department and may avoid formal proceedings through a stipulation of discontinuance of the particular practice involved. That doesn't involve his having to expose himself to any publicity of the fact or of any other affirmative action at that time. It does place him in a position that he has been warned, he does know the rules of the game, and that in the future if he finds himself crosswise of the regulatory programs, any one of the 50-odd administered in our Department, that he certainly will be accused of wilfully committing the act.

I think, skipping over some of the points covered by the other

speakers, that no one touched particularly on the field of complaints. We have touched more on the field of your obtaining advice for your client to keep him out of trouble. Now regulatory agencies, like the Department of Agriculture, the Federal Trade Commission, receive thousands of complaints a year, and out of those thousands there is probably only 15 to 20 per cent that it develops warrant formal investigation. If you want to serve your client, you have got to bear in mind that complaints generally are considered as confidential. Agencies have gone before committees of Congress and refused to disclose the names of complainants because they feel that that is necessary if we are going to get proper enforcement, so therefore the Bar may feel safe in disclosing all the facts with respect to the particular complaint that their client has with respect, in his industry, to damage he is suffering which might be eliminated by federal action. And I think you must realize that the government attorney is in the same position as the outside practitioner. When a matter is brought to him, he has got to have the facts before he can make a determination as to the legal effect of the action involved. And you would serve your client to a far better degree if you would give us a complete statement of facts when you file a complaint on behalf of one of your clients. The same thing applies to interpretive rules. If you want an interpretation, the broader your statement of facts and the more complete as to the specific problem, the more effective any interpretation you receive will be, because it is going to be limited to the facts that you convey to the agency you are dealing with.

One problem I think in that field is the fact that although the Administrative Procedures Act provides for the publication of organization and channeling of functions and all final delegations of authority those are not codified in any way. They are not pooled together in any annual publication. You have your organization manual of the government, but that just gives you a summary of the field of operation of each agency and the principal offices thereof.

The Department of Agriculture, in order to be of aid to the public generally, so that they may be informed as to where they can obtain information and informal advice, puts out an organization in field activities of the Department of Agriculture each year. It is a directory. This is in all the field offices of the Department and there are thousands of them. I do not believe there is any

individual in this room or in the country, for that matter, that is not in touch by local phone call to some office or agency of the Department of Agriculture. And by going there, if you do not want to acquire one of these from the Government Printing Office at the cost of 65 cents, you can find out who is the supervisor with respect to the particular program you are interested in in your particular area, and thereby present your problem orally and get advice or get directed to the particular office of the Department of Agriculture which can give you an authoritative opinion in that regard.

With respect to adjudicatory opinions and decisions the Department of Agriculture puts out monthly a compilation of Agriculture decisions, and those are available through subscription to the Government Printing Office on an annual basis, or if you are interested in just a particular program, you can write to the Department, be put on their mailing list for mimeographed copies of those decisions.

They are also furnished to some 300-odd libraries throughout the country, and if you are interested, and they are not available in the library in your area, I would suggest that you get in touch with the Information Section of our Department. They will be glad to put that library on the mailing list so that you will have readily available a compilation of all of the formal Agriculture Department's decisions in adjudicatory proceedings.

Those are indexed in the December issue each year. There is no general index of the decisions covering all decisions that have been issued. We have some 600 to 700 formal proceedings a year plus innumerable informal proceedings which are not reported in this document.

Our time has run short, but there were one or two additional thoughts that I think I might throw out. We, like all other agencies, are anxious to improve our procedural rules to the greatest degree possible; but are reluctant to change them just for the sake of change. We have, just in our own Department, for example, proceedings where we have very formalized procedure for adversary proceedings, where a man is charged with an unfair practice in the particular field regulated or something of that kind, where you are going to take his license away from him.

On the other hand, we have in the Department some 15 to 20 thousand cases a year before farmer review committees where a farmer comes in and is not satisfied with his marketing quota and

therefore he is entitled to a review before a farmer review committee of his fellow farmers from that county or surrounding counties appointed by the Secretary.

Well, you can readily see that the same formality and technical procedure is not adaptable to that type of proceeding; and if it were adaptable, there would not be enough lawyers available to handle the technical proceedings that would result.

In view of the time element, I think I will leave the rest of our field to a matter of development by question and answer.

SOME PROBLEMS POSED BY "ADVISORY RULINGS" FROM GOVERNMENT AGENCIES

By Donald C. Beelar,
Immediate Past Chairman, Administrative Law Section, American Bar Association

I am going to talk only about the problem of what you call in the calendar "interpretative advice," but I am going to take out that word "advice" and I am going to call it "advisory rulings." There is a difference.

In this subject of advisory rulings, we are running into something as a legal profession that is a little bit outside of our experience. You know we are inclined to be litigation-minded; yet we are dealing with something here which is not a litigation proceeding. It is not, in a formal sense, adjudication, rule-making, or even action.

I think we must keep in mind that this is really a new facet of the administrative process, for the interpretive or advisory ruling may in one sense be adjudicatory. It may ripen into an adjudicatory proceeding. Or it may be related to a legislative type of action; or it may be related merely to an administrative action. How does the agency handle this sort of thing? Can the advisory ruling not become a convenient substitution from the agency's standpoint for what would otherwise require a declaratory order or a formal decision on a question of jurisdiction?

For example, there are two boards not represented here which regulate more or less the same subject with some overlapping jurisdiction. They proceeded against one of my clients at one time; and I raised very properly and formally the very question of jurisdiction which is clearly in the case.

The next thing we heard was that the agency's investigator was out carrying on his studies just as if there had been no question raised. The client asked him, "How about this question of jurisdiction?"

The investigator said, "That has been decided."

"How was it decided?"

Well, the investigator said, "the Chairman of my Board telephoned the Chairman of the other Board and the Chairman of the other Board told the Chairman of my Board, 'You can have him.' "

The real problem here is: what is an advisory ruling? Is this a private ruling, an *ad hoc* ruling or something like it? Are you trying to gain information as to how the agency under this interpretation would interpret their rules or the law if a particular case were presented; or are you trying to discover what is their policy with regard to this matter in areas other than that published? Can you rely on what you're told?

When I tried to get a little factual information on this subject, I turned to the House Government Operations Committee Survey on Agency Practice and Procedure, and I looked up the item of interpretative rulings for all agencies represented here in the panel. I might tell you that this was the most unenlightened topic in the whole collection of 2500 pages. Notwithstanding the illuminating statements made here today, this is a subject on which there hasn't been much thought given in an organized sort of way.

It is also one on which you will find very little in the agency's rules of procedure. In other words, how do they welcome this sort of thing and what are the ground rules?

When you make a proper request, you should have a clear-cut answer if it is to be of any real value. I don't think you should get back a reply from the agency limited to "We will take this under consideration and be in touch with you later."

I think there should be rules about advisory rulings. Basically, I think the agencies should designate somebody who has responsibility to pass upon advisory rulings. This, I think, is almost absent from the existing organizational procedures. There should be somebody to whom you can go, and I certainly concur with the suggestion that has been made twice here, that you should not go after one member of an agency to get an interpretative ruling. And certainly, if you do, you should not try to do this at a cock-

tail party, which I think was the actual situation in one case referred to.

I think with these observations on a sort of catch-as-catch-can basis, that I believe we can turn the rest of the period over for questioning.

QUESTION PERIOD ON ASSISTANCE AVAILABLE TO THE PUBLIC FROM GOVERNMENT AGENCIES

MISS SMALLEY: How many of the inquiries relating to advisory interpretations come from lawyers representing clients as opposed to the clients in person?

MR. MEEKER: Let's answer the first one first. Mr. Stone, you had some statistics.

MR. STONE: Well, I can only say it is pretty well mixed, that we get inquiries from both attorneys and private individuals. Attorneys will ask for some interpretations, some advisory information, and others, private citizens, who want to know how to go into the airline business, and whether such and such is required, and whether we mean by such and such a provision that they have to do such and such. I couldn't give you any statistics on it, but you get them well mixed.

MISS SMALLEY: Is there a general difference in the type of question asked by the private citizen as a private citizen as opposed to others?

MR. STONE: Yes, I would say so. Usually the lawyer, unless he is totally inexperienced—and you do have that type of practitioner, who really doesn't know anything about it—is more specific. He gives you the real knotty one, usually with something more back of it than the simple question.

MISS SMALLEY: I would like to know, and this again from everybody, what the interrelation between the request for an advisory interpretive opinion is with a subsequent petition either for ruling or with a subsequent petition for a declaratory order.

MR. MEEKER: Members of the panel?

MR. STONE: I do not quite get it, myself, I'm sorry.

MISS SMALLEY: You don't get it as a question? All right, suppose I asked you for an opinion with reference to carrier access of the type that you know hypothetically. You tell me you can't make a determination because I didn't tell you how many planes B had, what proportion of B's business five planes represented. I then come in with a petition for a ruling as to what is the definition of a "substantial portion of the business of a second carrier."

I can come in for a rule-making. Do you get a follow-up like that ever?

MR. STONE: I don't know. I don't think we have rule-making on a question like that.

MISS SMALLEY: You wouldn't have rule-making on a question like that, but the same thing could be a subject, you see, for proceeding by rule-making.

MR. STONE: Of course, if there is a proceeding pending or we anticipate one, we certainly do not try to go in there prematurely and give some advice. We accept the question and answer it simply on the basis of the facts as

presented. If there is anything indicating that there is to be a proceeding or will be a proceeding, that isn't the area in which you would give advice.

MR. MEEKER: The distinction that I think is attempted to be made through the question is the difference in the effect of denial, perhaps, of an informal interpretation and then the alternative course being to go either by way of a petition for a rule-making procedure or for some form of a declaratory order on the basis of the initial facts in the petition for a ruling and perhaps additional facts.

MR. STONE: I could follow that up by saying that if we do get a question where we do not anticipate rule-making action or procedures and then find that we do get into it, of course we couch our language in such a way that I think we are safe. But later on, if there is a rule-making proceeding, I do not think that the opinion would act as an estoppel even on the part of the general counsel in changing its opinion.

MR. VAN CISE: Mr. Chairman, I was disturbed by the remarks of the last speaker on the program. Perhaps I misunderstood him. I thought the inference was that the practice of administrative agencies in giving informal advice outside of adversary proceedings possibly was considered to be questionable. I am not familiar with any such practice except in connection with the Federal Trade Commission.

I would like to say in my humble opinion such a practice of giving informal opinions is absolutely essential. The Federal Trade Commission deals with a statute which says what is unfair is unlawful. It then deals with a statute called the Robinson-Patman Act, which says a lot of things that no one understands. If we have to take years of formal proceedings to get answers and spend hundreds of thousands of dollars in the process, we have very unhappy clients. If, however, it is possible to waltz down to the Commission, talk things over quietly with the staff and within the process of a month get a fairly good answer, I believe the Bar, the client, and the public are very well served.

MR. MEEKER: Is there a question now on this subject matter or Miss Smalley's area of inquiry?

If not, we will move along to any others that you might have.

I would like to ask Mr. Beelar a question, if nobody else wants to, whether that person who would be giving all these advisory rulings under his form of administrative Eutopia that he suggests would be giving a ruling which would be subject to any appeal.

MR. BEELAR: I think the answer is no, and I think this is misunderstood. I have said that I have grave reservations about the practice of agencies rendering to citizens what I call legal opinions.

The Attorney General very clearly restricts the scope and the persons to whom he will render legal opinions, and I am relying on this. The idea of delivering a legal opinion from agencies could have potential good, but I think it could also have potential harm if it becomes widespread and is in the context of legal opinions to laymen.

Now I have no problems as a practitioner in trying to evade litigation, narrow the questions, ascertain jurisdiction, or separate out the questions of law from fact and go ahead this way. I think that is a different problem. I am speaking very technically when I say we are talking about legal opinions

from administrative agencies. Since the advisory ruling is not an action, I do not think it will be subject to review—no, of course not.

MR. MEEKER: May I say, let's take from the standpoint of the SEC, since the Chairman isn't here—if an issuer wants to come in and ask question as to whether a particular merger may be exempt from the full registration requirements of the Securities Act instead of having his counsellor in New York or Washington do it, it seems to me he is entitled to the views of the Commission just as much as his lawyer would be if he came in and asked us whether or not we would give him a no-action letter based on all the facts in this transaction.

It seems to me that is what we are talking about in many of the situations that both Judge Gwynne and Mr. Van Cise have referred to.

We are not giving formal legal opinions to anybody as a matter of grace or right. But we think that a person ought to know how we feel about a proposed transaction in advance of meeting us formally in court. And I think that is the thrust of the point that we have been talking about here in terms of informal interpretations and I invite any of the rest of the panel to respond to Don on that subject.

MR. BUCY: I think that is true, and particularly in an agency that has licensing and all that type of activity. Certainly, if a member of the public or an attorney comes in and asks the agency, "Do I have to have a license here?", why, it is in the nature of a request for legal opinion in a sense, and I think you are advising him, "Well, no, you don't have to have a license" on the statement that you have given.

I think there is extreme difficulty in drawing any line of demarcation where you are going to say this thing becomes a formal legal opinion which is invading the field of private practice and the field where you are servicing the public in a manner that they should be entitled to be served.

MR. ANGIOLILLO: Judge Gadsby says write in all the facts. I agree you cannot answer a question intelligently without all the facts, but what is the difference if it is the Brown Company or the Smith Company? Why the names? And at the same time, he is inferring immunity all along in the same category here, and yet he goes on and says further that in one case they went ahead and proceeded.

MR. MEEKER: Well sir, as far as I am concerned, in my own experience with the SEC, I think that names are important because in the first place, it ties into what I think is the responsibility of a non-practitioner or a practitioner in giving to an agency all of the facts, to disclose all of them, including the names of the principals.

Very often we find out in some of these requests for interpretation, information which should or should not have been reported in one of our filings under one of our acts.

This is part of our job, to see that these facts are fully disclosed. We get information which assists us in carrying out our other duties. You cannot expect, I don't believe there is any Government Agency around here who will give freely a hypothetical interpretation and if you are coming in in good faith, what difference does it make whether you give the name of your client or not? It is kept confidential by the agency.

MR. ANGIOLILLO: It is not stopped there. It isn't said it is kept confidential. It might be kept confidential.

MR. MEEKER: One of my predecessors went to jail for an hour for this principle. It is quite important down our way, and if there hadn't been a Judge in the Court of Appeals nearby he would have been there a little longer.

MR. WELLS: My name is David Wells, and my question bears on the extent that information given out at an informal conference can be used by an agency. Let me give you these facts: The agency is not represented on the panel, incidentally. I went to the staff of the agency and informally told them that my client did not believe himself subject to the jurisdiction of the agency and that it would not answer certain interrogatories. Now, this would have brought about judicial review eventually under *Rochester Telephone Company* v. *FCC,* the way I figured it out.

Well, the staff threatened me with extending the due date for the response to the interrogatory on past the time of the investigation or until they had completed the investigation, and they, in fact, did extend the due date for my response, although everybody else had filed their response and I am still hanging out in the air.

I don't know what is going to happen. I just wonder if information that you give to a staff like that can be used like that when you don't request an extension for a due date to a response like that; they give it to you anyway to keep you from violating the law.

How can you violate the law?

MR. MEEKER: I would say the answer to that should be referred to some of my more sage colleagues on the panel. Judge Gwynne?

CHAIRMAN GWYNNE: I can give you a very quick answer to our procedure. Our investigators do go out and gather a lot of information. That is for their information in making up their minds whether they will recommend the filing of a complaint. If they recommend the filing of a complaint, the case is tried. The case is judged by the hearing examiner and by the Commission, maybe, eventually, only on the evidence that is actually introduced in the record in the presence of both parties and subject to cross-examination.

The investigation file is not part of the record. Does that answer your question? I am not sure it does.

MR. WELLS: Let me direct a question to you along that line. Can your Staff come to you as a Commission and ask you to do something like that so they can have more time to study the situation? That might be the case here, I'm not sure. But could the Staff say, "This party is refusing to respond to our interrogatories. There will be a court proceeding if we do not do something." So can they come to you and recommend that you issue an extension of the due date for the interrogatories or whatever information you are asking for?

CHAIRMAN GWYNNE: We do not quite have that problem, I think, that you may have been up against. We do have this: The investigators go out, they investigate the case in their own way. They are pretty much free from any interference except in very general terms on the part of the Commission. There is a provision in the law whereby they may resort to com-

pulsory process to get information. They have the investigative subpoena. Of course, to get that, they must make a showing to the Commission and the Commission then authorizes someone to go into the District Court to take the necessary facts. The Commission itself does not have too much, except in a general way, contact with the actual investigators, and none with the trial.

MR. MEEKER: I would assume that some of these proceedings are preceded by an investigation which is under an order of investigation which has been authorized by the agency involved, and that perhaps there are situations in the course of an administrative proceeding which is noticed for hearing commencing after the investigation has gone say for two or three months.

There may be a point where again the Staff will want to conduct further investigation before going to issue finally. Now, I don't know what administrative proceeding you are referring to, and it is difficult to answer your question without a knowledge of the procedures in the agency with which you are concerned, but there always is this possibility that someone who is the subject of a proceeding may be faced with the informal or private proceeding of investigation at the same time as he is preparing an answer or a response on the basis of a notice of public hearing in a regular administrative proceeding which goes before the Examiner and ultimately to the board or agency and subject to judicial review.

And there are a lot of cases around where the counsel have sought to enjoin the administrative agency, including ours, from proceeding with a private investigative order while they are an adversary in an administrative proceeding. Those have generally not been successful.

As a matter of practice, when we go into court, we consider ourselves to be subject to the Federal Rules of Civil Procedure, and while we think we have a right to continue a private investigation, we believe that we have a duty to the courts to conduct ourselves like other counsel before the courts and we refrain from proceeding privately with the investigation, and we follow the Federal Rules and go by way of route of discovery as has there been provided.

That is in the judicial area. Mr. Scharfeld has a comment, I believe.

MR. SCHARFELD: It would seem to me that on the basis of the facts stated by the gentleman, that he could immediately ask for a declaratory ruling, that is, of a formal nature, or he could take another alternative and say, "I don't want the extra time. Now you do what you please. I am not going to reply."

MR. WELLS: That is precisely what I did, sir, but I still don't have any action.

MR. BEELAR: Mr. Moderator, I want to make it clear I am in favor not of drying up these sources, but of actually getting them better organized and more available.

But I still say that there is a line here I am not prepared to draw, but there is a line here between what information and interpretations, we can get by one means or another and the problem of an agency rendering what I would regard as legal opinions.

From my limited experience in the Antitrust Division, you do not get a legal opinion on a merger. You simply get a statement that on the facts submitted to them, that they will not do so and so.

MR. MEEKER: That is the "no action" letter we have been talking about here.

MR. BEELAR: That is different. I do not regard that as a legal opinion in the sense that I am using it.

MR. MEEKER: Then you accept all that has been said about "no action" letters and you are happy to have them?

MR. BEELAR: Yest, but I do not want the agencies saying that this action will give you anti-trust immunity.

MR. MEEKER: I do not believe anybody said that. If it has been said this afternoon, I haven't heard it.

MR. STONE: Mr. Chairman, I would like to comment there, and I want to emphasize it, that we make it very clear that our advice is simply for what it is worth, and that they may be better lawyers than we are, and just because they have got an opinion from the general counsel's office does not mean that they are not going to have to make like lawyers. Certainly if they get an advisory opinion or an interpretive opinion with which the practitioner does not agree, he certainly can go to the board itself, and I will say that many times the board doesn't also present our legal view. That is why we are in court sometimes, when we prefer to be back in the office.

MR. BEELAR: I think there is a difference, if I may say so.

An agency, because it has adjudicatory functions, if you ask them for a ruling of some kind, they are apt to shy away from that and say, "Look, you are playing with a closed hand and you want me to play mine face open." There is that attitude. I think the agency would look at the proper function of advisory rulings as if it didn't have any judicial functions. This is one reason why the Treasury decisions are very useful in my judgment, because they are concerned only about the legislative or administrative aspect of this ruling primarily.

MR. MEEKER: Well, they have enforcement concerns.

MR. STONE: Oh, yes.

MR. MEEKER: Just as we do, and this is another aspect that the administrative agency has to be concerned about. When you give an advisory opinion, you have to look at the impact on your enforcement policy. The Treasury is a law enforcement agency, just like the rest of us, and a very large one, so that I think they have that same problem if they give an advisory ruling.

This gentleman here has a question. May we have your name, sir?

MR. JONES: J. P. Jones.

I believe Mr. Stone pointed up my inquiry, and I again speak to the issue that Mr. Beelar and Mr. Van Cise raised. I think Mr. Beelar's point is a very unselfish point and one that really serves the public, because what more could a lawyer want than some layman who has gotten one of these opinions and acted on it, and gotten himself in trouble, and then bringing it to you. I mean that is better for a lawyer if lawyers are going to be selfish than some man coming to you beforehand and getting your advice on how to proceed. Along that line, I would like any of the gentlemen on the panel to answer this question, please: How many of the agencies as a matter of policy put in these opinions, be they oral or written, an admoni-

tion that this opinion smacks of legal advice, and in order for this person to proceed intelligently, they should consult their attorney?

MR. MEEKER: May I inquire, so the record is clear, sir, whether you are talking about what has been commonly referred to here as "no action" letters?

MR. JONES: No, sir.

MR. MEEKER: Or are you referring to what has been described by Mr. Beelar as legal opinions given by agencies?

MR. JONES: I am talking about what the agencies term interpretive advice. You are asking me to answer the question that I am trying to get an answer to.

MR. MEEKER: Sometimes the Moderator has to protect himself and the panel, but this is only for clarification, obviously. I will be very happy to refer that to some of the panel.

MR. BUCY: I might say that very frequently we get inquiries that smack of just that, of something that should be taken to an attorney and a letter goes back to him advising him that we do not render opinions for members of the public, that they will have to go see their attorney, that here are the regulations, and they are explicit and they will have to go see their attorney if they want a formalized opinion, unless they want to follow the regular procedures which would lead to it.

MR. MEEKER: I think if you look at the rules of practice of some of these agencies, you will see that it permits of practice before them by non-lawyers. And this has got to be borne in mind. The agency under those circumstances has equal responsibility to serve the non-lawyer who is permitted to appear for his issuer in our case as well as anybody else. But when we give a "no action" letter, we do not give any legal opinion. We are very happy to have Kirkland-Fleming come over, and any other law firm around for the client; but we don't think in any other way that we ought to be a referral agency to lawyers. This is very dangerous.

MR. JONES: You are not a referral agency to lawyers.

MR. MEEKER: That is right, but then the next question you get, sir, and I have had some experience in this area, is, well, whom would you suggest?

MR. JONES: I don't practice in this area.

MR. BEELAR: I think I should say Mr. Meeker came over and told me, "The time is getting late. Don't say very much, but say something that will start the questioning." I think maybe I did.

MR. MEEKER: You are very successful.

Are there any other questions?

MR. BASKETTE: I would like to ask one short question. Is there any reason why, starting now, the entire government couldn't start something like the Administrative Law Reports, and have them all published in that with a combined index for the whole thing worked out at one source?

MR. MEEKER: Well, I will speak for SEC. We are having great difficulty getting money to get our published reports of the Commission's decisions for the last three years bound, so that they are available in libraries. We have never had an index to those opinions as they have been bound over the years. We would like to have that. We are trying to bring the SEC judicial

decisions of which the last printed volume is 1948, which the Bar likes to have. We are trying to get those printed so the Bar can use them. These are all special projects, and you just try to get some money from the Hill for printing up volumes, no matter how helpful they are going to be to somebody else.

We have made some progress in the last three years, and we ought to be up to date in a year or so, but we still have the problem of an index. We have also the problem of possible codification. That subject was raised with the Subcommittee on Legislative Oversight in connection with the functions of the Federal Register, and I understand that they are going to look into that a little more.

MR. BUCY: I think you also run into not only a substantial money problem, but you run into the fact that in many of these fields they are highly specialized fields where you have a much more limited demand for the cases and the rulings of that particular agency, so that the cost is much less if you just publish for the particular agency and they are available to the public than if you put them to the expense of buying a very substantial volume, or set of volumes, in order to get that particular agency's decision.

MR. BASKETTE: Well, that is true of the decisions of the court.

MR. BUCY: Because if each agency had to contribute to this general publication, they certainly would not have money left to put out an individual one for the agency.

MR. MEEKER: Mr. Scharfeld, did you have a comment?

MR. SCHARFELD: Yes, with respect to the FCC, its decisions are published, I believe, on practically a bi-weekly basis, by the GPO; that is, its formal decisions. But all of those decisions, plus examiners' reports and plus all other actions of the Commission of any importance are published by the Pike and Fisher Service, and I might say that that service was established through the cooperation of the practitioners before the Bar of that Commission and Pike and Fisher Service, so it could very well be that those agencies which now do not have an adequate service codification and indexing might be able to work out a private sort of matter of this same nature.

MR. MEEKER: Thank you very much.

II. CONDUCT OF ADMINISTRATIVE PROCEEDINGS--PRE-TRIAL DISCOVERY ROLE OF THE EXAMINER

INTRODUCTION

By Valentine B. Deale,
Immediate Past Chairman, Administrative Law Section, D. C. Bar Association

The purpose of this part of our Institute is to examine the procedures between the time agency proceedings have come into being and the time of hearing. The agencies have various techniques and tools in this pre-hearing period to sharpen up issues, to reduce delays, to reduce the hearing record, and generally to expedite a conclusion.

Now, as we will see, different agencies have tools and techniques that they use, and they use them in some cases with different results.

We have three agencies represented: the Federal Communications Commission, the Federal Trade Commission, and the Civil Aeronautics Board. We also have three outstanding practitioners before each of those three agencies.

We are going to run this morning's discussion along the following line: First, we will hear from an agency member, and he will address himself to the general subject matter which I have just noted and which is roughly outlined in your program. He will talk about those techniques and tools in the pre-hearing period as applied to his particular agency.

Then, after he finishes his remarks, I will invite the panel to pose questions to the speaker, and at that time it is expected that the practitioner before that particular agency will lead the questions.

Then, after the questions of the panel have run their course, or after I cut them off, I will invite questions from the audience, but the questions then should be, of course, related to the particular agency which we are talking about.

Now, this will start first with the Federal Communications Commission; then we will go to the Federal Trade Commission, and then the Civil Aeronautics Board. After that is over we will invite a free-for-all discussion.

THE PRE-HEARING CONFERENCE IN HEARINGS ON COMPARATIVE BROADCAST APPLICATIONS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

By John C. Doerfer,
Chairman, Federal Communications Commission

I am happy to participate in a panel discussion which includes, among other topics to be considered, the advisability of the Pre-Trial Conference in administrative proceedings.

It is my opinion that the use of a Pre-Hearing Conference with respect to certain hearings held before examiners of the Federal Communications Commission is advisable, albeit in some instances it is not.

For a good many years, practicing attorneys, Bar Associations, and government agencies have given a great deal of thought to procedures that will eliminate unnecessary delay, expense and volume of records in the adjudicatory proceedings before government agencies. The benefits to litigants, to the agencies and to the public from procedures that facilitate a more orderly and prompt hearing are so obvious as to require no elaboration. The particular time and expense-saving procedure which I would like to discuss is the Pre-Hearing Conference.

The necessity for utilizing every reasonable technique to shorten the administrative hearing process has been particularly urgent in connection with certain phases of the Federal Communications Commission's licensing functions. In order to better understand the various rules the Federal Communications Commission adopted and changed, a brief outline of our duties is in order. Our agency is required to act on initial applications or renewals of licenses for various types of electronic communications—wire and radio. There are approximately 400,000 radio authorizations presently outstanding. The renewal terms vary from 1 to 5 years. In addition, the Commission has jurisdiction over common carriers in the communications field and must exercise all of the customary regulatory functions including rate making and other practices.

In terms of numbers, the vast majority of licenses and license renewals are acted upon by the Commission without the necessity of any hearing. But in the field of initial applications for broadcast facilities, particularly television, the necessity for comparative

hearings frequently arises. This is understandable in the light of the fact that in many cases the licenses sought relate to valuable broadcasting privileges which are generally the subject of bitter contests.

The Communications Act lays down the basic qualifications which all applicants for broadcasting licenses must meet. These are the legal, financial, character, technical and citizenship qualifications. When a single application is filed for a particular license, the Commission by means of its application forms and authority to require the submission of additional information under oath concerning the applicant's qualifications and proposal, can usually obtain the information required to determine the basic qualifications of the applicant and whether the grant of the application will serve the public interest, convenience and necessity. It is in cases where there is more than one applicant for a particular frequency or channel that the necessity for a comparative hearing arises.

Approximately six years ago, when the Commission lifted the "freeze" on television grants, the adoption of the Sixth Report and Order which established the framework of a nationwide allocation of television channels let loose an avalanche of competing TV applications which were promptly designated for comparative hearings. It did not take us long to realize that unless some procedure was devised to insure a reasonably prompt and orderly conduct of the hearings, service to the public would be seriously delayed. The first hearings scheduled were commenced under a procedure that had been in existence from about the time the Commission had been created. There was no formal "pre-trial" procedure in existence. Each of the competing applicants put its entire case into the record through oral testimony; cross-examination was virtually interminable, competing applicants shored up the weaknesses of their cases as the comparative hearing progressed.

Coincidently and about this time, President Eisenhower called a conference on Administrative Procedure. Acting upon instructions from the President, the then-Attorney-General prepared a list of those departments and agencies of the Federal Government which had adjudicatory and rule making functions. Fifty-seven such departments and agencies were listed. Each of these agencies named a delegate to the Conference. Members of the judiciary, federal trial examiners, and members of the Bar as well as Commis-

sioners and Commission personnel participated in the work of the Conference. It was composed of 75 members and delegates. The Honorable E. Barrett Prettyman, now Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, was designated Chairman.

The Chairman appointed and the Conference ratified the appointment of nine committees. I had the honor of serving as Chairman of the Committee on Pre-Hearing Conferences. The report of the Pre-Hearing Committee, as well as the reports of the other eight committees, was published in 1954. It is entitled: "Report of the Conference on Administrative Procedures." Copies can be obtained at Office of Administrative Procedure, Department of Justice, Washington, D. C.

The Pre-Hearing Committee recommended and the Conference approved the recommendation that all agencies should adopt the procedure of pre-hearing conferences.[1]

The recommended pre-conference rule was the net result of extensive study by experienced technicians, lawyers, examiners, and agency personnel in the field of Administrative Law. It was patterned after Rule 16 of the Federal Rules of Civil Procedure. The work of the Committee on Pre-Hearing Conferences was also subjected to debate in the third plenary session of the Conference and to some extent at the fourth and final session of the Conference

---

[1] The rule recommended by the pre-hearing committee was as follows:

> In any proceeding the agency or its designated hearing officer upon its or his own motion, or upon the motion of one of the parties or their qualified representatives, may in its or his direction direct the parties or their qualified representatives to appear at a specified time and place for a conference to consider
>
> (a) the simplification of the issues;
> (b) the necessity of amendments to the pleadings;
> (c) the possibility of obtaining stipulations, admissions of facts and of documents;
> (d) the limitation of the number of expert witnesses;
> (e) such other matters as may aid in the disposition of the proceeding.
>
> The agency or its designated hearing officer shall make an order which recites the action taken at the Conference, the amendments allowed to the pleadings and the agreements made by the parties or their qualified representatives as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements; and such order shall control the subsequent course of the proceeding unless modified for good cause by subsequent order.

[Report of the President's Conference on Administrative Procedure (U.S. Government Printing Office, 1955) pp. 37–38.]

on November 8 and 9, 1954. The report of the Committee on Pre-Hearing Conferences as well as the reports of the other committees, and their underlying papers have been lodged in the custody of the Secretary of the Conference, who is Miss Patricia H. Collins, of the Attorney General's staff. These documents are, in my opinion, valuable collections of source material on the subjects dealt with. No extensive research had theretofore been done on many of these subjects and thus the Conference materials are in such instances the compilation of original data. I believe that this research material will be invaluable to any government official, agency, professor, practitioner, or Bar Association undertaking to examine into Administrative agency procedures.

To get back, now, to the problem of the hearing procedure at the Federal Communications Commission. Our first attempt to expedite procedures in comparative broadcast hearings was the adoption of a rule which went further than the recommendation of the President's Conference. The rule adopted by the Commission in 1953 specified that, except for good cause found in advance by the Hearing Examiner, all broadcast hearings should commence with a conference between the Hearing Examiner and representatives of all parties to the proceedings, looking toward agreement on all matters raised with respect to the conduct of the hearing on the applications in question. The parties were required to come forward at the pre-hearing conference with a statement in writing of all the matters they intended to rely on in the hearing. The Hearing Examiner was directed to issue an order setting forth such matters, and the rule further provided that the proof to be adduced at the hearing by the parties would be limited by such order, unless it was modified for good cause.

In effect, this rule imposed a mandatory requirement upon each applicant in a comparative proceeding to state at the commencement of the hearing the specific grounds upon which he intended to rely to prove the superiority of his proposal or qualifications over those of each of the other competing applicants. This was commonly referred to as the "Points of Reliance" procedure. Experience under this rule was unsatisfactory. It soon became apparent that the effort to compel the parties to narrow the issues for hearing and to limit the character and quantum of proof to be adduced resulted in endless bickering among the parties and the development of a record of the pre-hearing conference which was almost as long as the hearing record itself.

There were some who felt that the "Points of Reliance" procedure might not have failed in its objective had the Hearing Examiners been a bit more informed and forceful as to what constituted a significant difference between or among the competing applicants. Be that as it may, it became apparent to the Commission, and I believe that the view was generally shared by the members of the Bar, that this innovation in administrative practice should not be continued in view of the fact that its total net effect failed to result in any appreciable reduction in the time or cost of conducting the proceedings.

Hence, the Commission, in 1956, after consultation with the Federal Communications Bar Association, repealed the "Points of Reliance" rule and tried a second method of shortening the hearing record. Here, again, the Commission followed two recommendations of the President's Conference on Administrative Procedure. The Conference had recommended that agencies publish for the use of practitioners before the agency, a practice manual of an advisory nature detailing the procedural steps involved, in all types of proceedings had under each statute administered by the agency. The Federal Communications Commission, early in 1956, published a hearing manual for comparative broadcast proceedings. The manual was issued to provide guidance to Hearing Examiners, Commission attorneys and members of the Bar in the introduction and use of evidence with respect to some of the evidentiary matters arising in comparative broadcast proceedings. I believe the hearing manual if kept current and wisely used will promote a more expeditious handling of comparative hearings.

In addition, the Commission adopted another important rule calculated to reduce time, expense and volume of the hearing record. The President's Conference had recommended that agencies require that documentary evidence which any party intended to offer at a hearing be submitted to the Hearing Examiner and to other parties in advance of the taking of evidence, to permit study and preparation of cross-examination and rebuttal evidence. The Commission's new rule applied this principle to *all* of the direct affirmative evidence proposed to be offered by an applicant in a comparative proceeding, by requiring the direct testimony of witnesses to be reduced to writing in advance of the hearing and exchanged with the other parties. Here, again, the Commission was pioneering in a new effort to shorten the hearing process

and record. And, again, we met with not wholly satisfactory results. Within a very short time a considerable amount of resistance developed principally from the attorneys practicing before the Commission, who objected to the mandatory requirement of a written presentation of their case. After considerable further study and consultation with members of the Bar, the Commission adopted, in the latter part of 1957, the rule which is presently in effect governing the conduct of hearings, which *allows* the parties to present their cases in written form only upon agreement of all parties involved.

Throughout all of the period that I have been discussing, there has been a pre-hearing conference rule in effect at the Commission. The rule followed substantially the recommendation of the Pre-Hearing Conference Committee of the President's Conference. When the Commission abolished the mandatory requirement of written presentation of cases, the rule on pre-hearing conferences was amended so as to include a greater number of matters to be considered by the parties in advance of the hearing with a view to reducing the size of the record. In adopting its new pre-hearing conference rule, the Commission stated that it is the policy of the Commission to encourage the parties to submit all or any portion of their respective cases in writing but, as I have mentioned, this was left to the discretion of the parties. Our present rule on pre-hearing conferences reads as follows:

> "§ 1.111 Prehearing conferences.— (a) The Commission or the presiding officer on its or his initiative, or at the request of any party, may direct the parties or their attorneys to appear at a specified time and place for a conference prior to or during the course of a hearing, or to submit suggestions in writing, for the purpose of considering, among other things, the following matters:
>
> (1) The necessity or desirability of simplification, clarification, amplification or limitation of the issues;
> (2) The possibility of stipulating with respect to facts;
> (3) The procedure at the hearing;
> (4) The limitation of the number of witnesses;
> (5) In cases arising under Title II of the Communications Act, the necessity or desirability of amending the pleadings and offers of settlement or proposals of adjustment; and
> (6) In cases involving comparative broadcast application:
>
> (i) Narrowing the issues or the areas of inquiry and proof at the hearing;

(ii) Admissions of fact and of documents which will avoid unnecessary proof;
(iii) Reports and letters relating to surveys or contacts;
(iv) Assumptions regarding the availability of equipment;
(v) Network programming;
(vi) Assumptions regarding the availability of networks proposed;
(vii) Offers of letters in general;
(viii) The method of handling evidence relating to the past cooperation of existing stations owned and/or operated by the applicants with organizations in the area;
(ix) Proof of contracts, agreements, or understandings reduced to writing;
(x) Stipulations;
(xi) Need for depositions;
(xii) The numbering of exhibits;
(xiii) The order or offer of proof with relationship to docket number; and
(xiv) The date for the formal hearing and such other matters as will be conducive to an expeditious conduct of the hearing.

(b) At the pre-hearing conferences prescribed by this section, the parties in any broadcast proceeding shall be prepared to discuss the advisability of reducing any or all phases of their affirmative direct cases to written form. Where it appears that it will conduce significantly to the disposition of the proceeding for the parties to submit any portion of their cases in writing, it is the policy of the Commission to encourage them to do so. However, the phase or phases of the proceeding to be submitted in writing, the dates for the exchange of the written material, and other procedural limitations upon the effect of adopting the written case procedure (such as, whether material ruled out as incompetent may be restored by competent oral testimony) is to be left to agreement of the parties as approved by the Hearing Examiner.

(c) An official transcript of all prehearing conferences shall be made."

This I believe, brings us up to date with respect to the history and development of the Federal Communications Commission's attempt to shorten hearing records by means of pre-trial conferences and by encouraging parties to present testimony in written form.

On the basis of my experience, I do not hesitate to say that the pre-trial conference is a valuable and essential element of any prompt and orderly administrative proceedings. It serves as a vehicle to soften the brittle attitudes of some contestants and to facilitate the common sense agreement to enter into stipulations, narrow issues, reduce cumulative testimony and so forth. It also requires a more careful preparation by attorneys and provides a basis for agreements that will eliminate unnecessary expense, volume and delay in compiling the record. To test my own personal reaction to the Commission's experience with pre-trial procedures, I recently asked the Chief Hearing Examiner of the Federal Communications Commission to convene the twelve Examiners at our agency and request their views as to whether or not on the basis of their experience with pre-hearing conferences, there had been any savings and advantages. I was informed that all of the Examiners indicated that pre-hearing conferences are advisable and that they do save expense, reduce delay and the volume of work.

Some of the specific advantages observable from the Commission's pre-hearing conference procedure are as follows:

(1) It permits in advance of scheduled hearing date a determination of the intention of the parties relative to the prosecution of the applications involved.

(2) It assists counsel in the preparation of his case through advanved disclosure of the areas of controversy and those in which no real controversy exists.

(3) It permits the determination of areas of stipulation, particularly as to the admissibility of evidence from the standpoint of competency and agreements as to the admission of evidence and production of witnesses.

(4) It permits advance rulings by the Examiner as to the relevancy and materiality of areas of evidence, and

(5) It permits a determination of the position of the parties relative to presenting their direct affirmative cases in written form.

In conclusion let me say that I heartily endorse and commend the constructive undertaking of the Administrative Law Section of the American Bar Association in instituting this discussion program on the practical problems in the field of administrative law. Your efforts indeed are deserving of praise and I am confident they will inevitably redound to the mutual benefit and advantage of the public, the administrative agencies and the Bar.

QUESTION AND ANSWER PERIOD

MR. DEALE: Thank you very much, Mr. Doerfer.

Now to the next phase of our program, and that has to do with questions. As I indicated earlier, we will first invite questions from the panel, and then after that questions from the audience with respect to FCC procedures will be in order.

MR. WILLIAM C. KOPLOVITZ: I would like to comment just briefly on some of the points made by Chairman Doerfer, and I have three or four questions that I have jotted down that I would like to ask him.

I was very much interested in the Chairman's remarks about the procedure which he referred to as the points of reliance procedure, which the Commission instituted very shortly after they lifted the freeze in 1952, and when they were faced with this huge number of complicated comparative hearings on applications for television stations in scores of cities throughout the country.

That point of reliance procedure was a provision for a pre-hearing conference which not only made a pre-hearing conference mandatory, but the rule made it mandatory that the pre-hearing conference produce results, because the Commission, under that procedure, required each applicant to commence the hearing, come to the hearing, with a written statement of precisely the grounds upon which he intended to rely in claiming that his clients should receive the grant.

The broad issues which the Commission had specified for comparative hearing had to be narrowed down. It was required that the parties state specifically within the broad areas of comparison precisely the matters which each applicant thought were of significant difference between them, and would be the basis of decisional import in resolving the controversy.

Now, as the Chairman pointed out, the results were disappointing, and that pre-hearing technique had to be abandoned.

The question I would like to ask the Chairman is this: whether there was anything inherently wrong, or whether there was some basic defect or fallacy in the theory of such a strong type of pre-hearing conference, which would make it the kind of a technique which other agencies might not profit by considering, or whether the unfortunate results in that type of pre-hearing procedure might not have been accounted for by the fact that it was instituted too soon after the lifting of the freeze.

I think it is important to bear in mind that at that time the Commission had not yet studied many of these comparative hearing cases. The parties didn't know what the Commission was going to consider to be of decisional importance; they had no way of knowing what preferences the Commission was going to use in choosing between competing applicants.

They had no guideposts to follow, and therefore attorneys were put in the position of coming to this pre-hearing conference and possibly agreeing to eliminate a point of controversy which might, in some other case, turn out to be a matter of substantial significance and of decisional import.

Now, we have a good number of Commission decisions, many of which have been reviewed by the Court of Appeals, and attorneys are in a better position now than they were then to know what constitutes a significant

difference, and to what extent the Commission has relied upon them in making a final decision.

Therefore, I would like to ask you, Mr. Chairman, to comment on this question:

Do you think that the points of reliance procedure, or one like it, may have a better chance of succeeding if it were adopted at the present time when attorneys are better able to stipulate with respect to the grounds upon which they would rely, and thereby narrow down the issues?

It is a long question, but my question is: What do you think of it as a possibility under present circumstances?

MR. DOERFER: Well, I would say there wasn't anything wrong with the theory. It didn't work, and I am going to offer my conclusions; I may not be able to document it.

You, as lawyers, know that in this type of a proceeding you are sort of talking off the cuff. A little research might require revision of my views. So that is the only qualification that I am asking you to bear in mind.

Points of reliance are peculiar to a comparative proceeding. There aren't any other comparative proceedings like it, that I know of, in any administrative agency or of any other hearing process in the country.

Points of reliance could prevail and would be a very efficient tool to cutting down some of the delays, if the Commission had definite criteria. But let me point out when you talk about criteria, you are talking about something that is fluid and flexible, despite what some of the courts have said, and some of the law professors have said, and what some of the Bars have told us.

Consider this: If you were starting out trying to implement a broadcasting system in this country fresh, with the experience that we have had now, or if Congress had had the foresight it could have laid down some specific criteria, but it didn't. Congress, in laying down the standards, laid down some very general ones.

First it said you have got to be an American citizen; that is the legal qualification.

Then it said you have got to have technical ability; you have got to have financial ability, and there may be some other factors, but the broad standard was public convenience and necessity, and that is a pretty broad one, especially in this field.

You have got to remember that administrative agencies are not courts. We, over at the FCC, sometimes assume the role of promoters. We are trying to promote the development of a technique or a frequency.

Those of you who have had any experience with communications work know the effort that the Commission has made to attempt to develop the FM frequency for broadcasting, and how it has attempted to get UHF off the ground so that you would have more competition in the communities.

But let me go back a little further than that. Back in the 1940's when the art was beginning to indicate to those entrepreneurs that it had possibilities, some of them almost had to be urged to take it. Licenses which I know today are worth as high as $6 million were turned back in the forties because they didn't think it was worth while, was feasible or practicable.

So what happened was that by the time the Commission got into these comparative proceedings, you had a pattern throughout the country. There

were 108 television stations on the air when I assumed office, and by the end of the year there were over 200. Those were the ones that were in the process of construction. They were in the pipe, so to speak.

So that if someone told me, and I thought it was wonderful, the first criterion is, why not have the local people have the television station. They know the community, they know the problems, and they could better respond. It sounded good on paper.

Let's diversify, let's not have the newspapers have a radio station and the television station, plus the morning and evening newspaper. Well, that sounded pretty good.

Let's have integration of local ownership and management. That sounded like a pretty good criteria.

You go down the line. Well, what happened? Here we had 200 stations already on the air; between 25 and 30 per cent of them were owned by newspapers, or other people who were multiple owners, and I couldn't find anything wrong with their record.

Theoretically it was a monopolization, but actually a lot of these newspapers—and the records will bear me out—didn't run their broadcasting services as they did their newspapers. They weren't quite as partial, they weren't quite as opinionated, and all the other things that those of us who sometimes resent in newspapers, you couldn't really find that in the pattern.

Now, you had to remember also that they were given these frequencies at a time when nobody wanted them. They practically got it for free.

I don't know how many contested cases there were in the first 108. I doubt that there were very many.

So that the Commission as now operating, not on a theoretical basis of what some college professor or some Congressman thinks the situation ought to be, has to take it as it is.

So when you say, and I agree that the points of reliance thing didn't work, it was because of the lack of criteria, and I don't know of any way that you could get definite criteria, because you have to take each community, you have to take the situation, and in some cases where you have one newspaper, we will say, having a radio station, it may be perfectly logical and reasonable to give it to another applicant who happens to be a newspaper, to equalize the competition, and yet it is probably the last, if any, ideal set of criteria. It is probably one that you would reject.

So that in the day-to-day application of these things, theory and fact just don't seem to mix too well.

I might make one more observation:

Assuming that Congress had gotten into some very definite standards, as it has in some other fields, if Congress had said that first the Commission shall give it to local owners, and then the local owners who are going to take an active part in the operation of a broadcast facility is the second criteria of importance, now I am saying that Congress is lining up the priorities.

Third, one who doesn't have any other broadcast interests.

Fourth, one who is financially responsible, et cetera, and go right down the line.

You have got to remember these are paper made cases before the Com-

mission. We wouldn't have any applicants excepting in that order of priority.

Theoretically, they are all equal again, and you might just as well either put the ticket in a hat and pull it out, or do as they did at Oklahoma, get them in a buggy and at 12:00 o'clock noon let the first one who got there get the application or the facility.

So that where you have the opportunity to construct your case even before you file an application, you have got all those criteria; all you do is just line it up. You are still going to be faced ultimately with the same difficulty: what unknown factor, what is the experience and background of the Commissioner, what is going to motivate him?

Well, I am very frank to say that I would like a service to get out there. But when you have seven Commissioners, and you are divided three-two-two, and you stay divided for six months, well, somebody has got to give. When you go over and make it a majority, what motivates a Commissioner including myself, is that it is more important to get that on the air than it is to keep up the deadlock, because fundamentally any one of them could have had it, had their opponent not appeared on the scene.

So when you get into this criteria situation, you are really in a field of intangibles, and when you are in that kind of a field, you can't devise effectively a pre-hearing conference rule in which the applicants come up and state in their points of reliance just in what particular field they are more superior to the other, and it goes on ad infinitum, because they can shift as they go along in the hearing.

Now, this is a little long, but I want to excuse it on the ground if you understand that, I think you will understand a lot of our problems and a lot of problems with respect to pre-hearing conferences in administrative agencies.

You have to know the agency and what its problems are. You just can't say that because it does common carrier work and common carrier rules work that you can draft a pre-hearing conference rule that is going to apply to this new creature that you can only associate with the 1950's. It never happened before; I can't find any similar analogy in history.

MR. DEALE: Thank you very much, Mr. Chairman. I am sure your answer provoked several questions in some of our other people's minds here.

Bill, would you want to carry on?

MR. KOPLOVITZ: I have a couple of more questions I would like to ask on a somewhat different subject.

The Chairman, in his opening remarks, and I think generally speaking everybody who approaches the problem of shortening the record, seems to emphasize the important role which the examiners and the attorneys who represent the parties before the examiner have to play in shortening the record, and I would like to pose a question to the Chairman as to whether the Commission, itself, might not make a contribution to a shortening of records in this way:

The Chairman referred several times to the fact that these complicated cases arise because when the Commission considers these applications separately, they find that each applicant possesses the qualifications and each

application would have been granted were it not for the fact that there were other applicants before the Commission.

So, what the Commission does as a matter of practice is to designate these applicants for hearing on boiler plate comparative issues, and in the usual case the Commission will say in the notice for hearing that these applicants will be compared in the areas, one, of their background and experience, bearing upon their ability to own and operate a station; two, the proposals of the applicant with respect to operation and management, and three, the applicant's proposal with respect to programming.

And then, under those broad comparative areas of possible comparison, they ask the parties to get together and stipulate, if they possibly can, the specific areas within those broad issues that they will go to bat on.

Now, the question I would like to ask you, Mr. Chairman, is this:

Isn't it possible that when the Commission examines these applications, in some cases at least, the Commission may determine that with respect to one of these broad areas that there is no substantial significant difference among the applicants, or between the applicants, and could eliminate that as a possible area of comparison, which would inevitably reduce the burdens upon the applicants with respect to the showing they have to make?

Now if the Commission, for example, were to have two applicants before it, both of whom were experienced licensees, both of whom possessed the know-how with respect to operation and management, perhaps that area of potential comparison could be eliminated. That would tend to shorten the hearing.

Of course, if an applicant disagreed, he could always ask the Commission to enlarge the issues, but the burden would be on that applicant to make a prima facie showing that there was, in fact, some significant difference in this area.

But the use of boiler plate issues—and this is the way I would like to frame my questions—does not the use of boiler plate issues in all these cases inevitably have the result of requiring the parties to put in evidence with respect to matters which may not, in fact, constitute any significant difference among them, and would not a more careful approach to the problem of the areas that should be compared among the applicants by the Commission, before they are designated for hearing, tend to reduce the size of the administrative record that will have to be developed by the applicants?

MR. DOERFER: Well, I think that that is an area that could bear some study; it may have some possibilities.

However, despite the fact that we make these preliminary findings, they are ex parte findings, and it is not unusual, and I think it is proper, that someone should be permitted to attack or to counter or to parry an ex parte finding.

The difficulty that I see there, Mr. Koplovitz, is that you have got seven Commissioners, and they are not all lawyers. I am not discrediting the non-lawyers but I just want to point out that Commissioners with different backgrounds and different philosophies may not agree, even at that stage, as to what is an essential field of inquiry and what is insignificant, because it depends upon their reactions.

For illustration: There are some Commissioners who obviously are very

definitely disposed toward this set of criteria; others feel that the most important is experience. If a man has been in the broadcasting field for a long time, has an excellent record, has done a good public service programming, they incline towards that type of person, especially when we have got in the statute a provision which permits any applicant to sell his license without the Commission being permitted to compare the proposed assignee or buyer with any other person, and the only thing you have got there is the broad basic one, would the sale be contrary to the public interest, and you are not allowed to compare with anybody else. So that some Commissioners feel that these various criteria are frustrated.

I have got—but I don't want to get into it—I have got my own ideas on it. But nonetheless, trying beforehand to narrow the issues might evoke a feeling on the part of some Commissioners that it is a pre-judgment.

I would like to say that you have asked a very interesting and stimulating question, and maybe we have overlooked a possibility. I would be very happy to put that on the agenda for Commission study, and say as they do on Madison Avenue, we will throw it on the floor and walk around it a couple of times and see what it looks like.

MR. DEALE: Thank you, Mr. Chairman.

In view of the time, I am going to cut off the questions, at least for the moment, of the panel, in favor of questions from the floor.

Now, are there any questions from the floor?

MR. DEALE: The gentleman with the pipe.

QUESTION: If a direct case is presented in writing, how is cross-examination handled?

MR. DOERFER: In the first place, my experience has been in the public utility and common carrier field.

The presentation of an affirmative case in writing is ideal for that type of thing, because it involves tables and statistics, and it is not the type of a thing that you can handle without some sudy.

Where a presentation is to be made in writing it is exchanged, and there is an opportunity to study it, and then all you have to do is to indicate to the examiner or the opponent, or both, that you would like to have that witness present at the opening date of the hearing, or two days after the hearing commences, and that you want to cross-examine, and the ordinary rules of cross-examination apply.

MR. RUHLEN: Mr. Doerfer—

MR. DEALE: I might say, before you ask your question from the floor, that it would be helpful to all hands if you would introduce yourselves.

MR. RUHLEN: Merritt Ruhlen, Hearing Examiner, Civil Aeronautics Board.

Mr. Doerfer, did you give any consideration when you were considering the requiring of them to put all their evidence in writing, to delegate to the hearing examiner discretion as to whether he should require all the evidence to be put in writing in any specific case, or to what extent he might require it? I mean, cases and circumstances change.

It seems to me that in certain cases it might be desirable, and the examiner could require all of it to be put in writing, some cases part of it, and in some cases none.

Did you consider that possibility?

MR. DOERFER: We did. We went through that and we had to retreat. It was mandatory that time. We gave the examiner the power, almost commanded it, but after some experience we had to retract, and now it is permissive, and there are good reasons for it.

As I indicated before, you may have some issues to which the written submission technique does not lend itself. You have got to remember, especially in ours, the chances are that you have more of a contest on character qualifications in a broadcast case than you would character qualifications of a professional accountant, or rate engineer, or an investment banker, or a cost-of-money expert in the common carrier field.

But in the broadcast field the opportunity, and almost the necessity, of an examiner viewing a witness testifying, especially under cross-examination, and being able to compare his reactions then in attempting to assay candor and demeanor with what he very glibly put in in writing, we will say, is very important, and even in a case of that kind it is much better that that go in even on the direct testimony, go in orally, because it involves character. It depends upon, is he the same fellow who got in trouble with the Bureau of Internal Revenue, or has he got some outstanding judgments that he never paid, and you see in our application forms we ask a lot of questions, and if he is lying to us, of course we are interested.

Now, he may have the opportunity to explain it away, and sometimes they do. They have got a good explanation, but the demeanor and candor is an important thing, and that is the area in which the written case just doesn't lend itself at all; it doesn't help. It might expedite, but doesn't help.

MR. DEALE: Mr. Koplovitz.

MR. KOPLOVITZ: There is one comment I would like to make with respect to the question that was asked as to written versus oral presentation, and particularly upon the problem we have here and bearing upon the length of record and delay.

In my experience the problem that has arisen with respect to the presentation of the case in writing that has caused trouble is where a party submits his testimony in writing, and it is exchanged, and then when it is offered, objections are made to a portion of the written testimony on the grounds, for example, that there are hearsay statements included that should be excluded under proper rules of evidence, or an opinion is stated by one who is not qualified to express an opinion and therefore the examiner rules it out, and that creates problems, because the party who offered that evidence in direct form feels that he can correct the technical error that was committed in the form in which the evidence was presented, and then wants to call a witness to testify with respect to those portions of the direct presentation that were excluded, and it is in that area where endless difficulty and a great deal of discussion on the record and bickering takes place, because the claim is made that the parties having submitted their case in writing are stuck with it and should not be permitted to bring the witness on the stand in addition to the written testimony to shore up the case by oral testimony.

That presents a problem that always has to be handled skillfully where you use the written case presentation rather than the oral presentation.

MR. DEALE: Thank you.

MR. BEELAR: This discussion, I think, points up a very real problem both to the agency and to the lawyer who goes into a hearing, and I think it is this situation: when the parties narrow the issues down for the purpose of trial, to what extent can the parties rely upon the agency a year later, confining the ground of decision to those particular issues.

For example: Suppose the parties at the time they go into a hearing, one party's facilities will serve more people than the other party's, but at that time this is not considered to be a significantly different ground of decision.

But suppose a year from now, by virtue of change of events, reversal, change of policy, this is a significant situation, and when the thing gets up to the agency other things balance out, but there is one facility that would bring more service than the other.

I just bring that out as an illustration of the problem of to what exent can the party go into a hearing and, in a sense, freeze the grounds of decision of the agency at some future time.

Now, can't we resolve this problem, that if the Commission wants to emphasize or rely upon grounds for decision at the time it is argued before the agency, that if they are going to do this, and I can see there are occasions when they should, should not the case be quickly reopened and reargued or resubmitted, if that is going to be a significant ground.

Do I make my point clear, sir?

MR. DOERFER: Well, I can answer that quickly. You can't have any reliance. There is nothing, especially in the FCC, that you can really get hold of with a firm grip and say that you can rely on. That isn't the agency's fault, either.

After all, I would like to pose this question to you:

How would you like to be sitting on an agency and decide a case on the evidence, the merits, and it goes up to the Circuit Court of Appeals, and while it is on appeal, a man dies who was in the proceeding, and it comes back and we have got to retry the whole thing because the man died. I don't know.

I used to try some negligence cases, and it would seem to me if we ever put in proof with respect to the life expectancy of an individual who was either permanently injured, maimed, or crippled, the fact, while I was arguing in the Supreme Court or Court of Appeals, that the man died, that this upset the evidence down there, but that is a type of thing that the FCC has to deal with.

Subsequent changes in the make-up of that applicant now become issues that must be retried.

So that regardless of how we narrow the issues, or what authority we give the examiner, if we could, we don't know, by the time when it comes up there, whether under these precedents we are obligated to send it back because of a new development down there, I just can't answer.

I would say that that is certainly a subject which should be, that is the type of thing that should be gone into very carefully, I would think, by some committee of Congress, so that not only the agency but the practitioners know what the ground rules are. We don't know what the ground rules are because they cut the cloth or the carpet from underneath us. I am getting a little bit exercised about that, but that is how I feel.

MR. DEALE: Mr. Chairman, I would like to take advantage of my position here and pose a question, and that is this:

What statutory changes might improve the procedural situation in FCC? And, sort of a corollary to that question, to what extent has the Commission, let us say, examined or made recommendations to Congress for statutory changes which would improve some of these situations which have been just described, for example, the matter of criteria, which impressed me very much.

It seems to me if you have criteria that are general, and it is going to be impossible to get expeditious proceedings, and perhaps satisfactory decisions, it becomes almost how an individual feels when the criteria are not satisfactory. But, in any event, the overall question is: What statutory changes might improve this situation, and to what exent has the FCC studied the matter and made recommendations to Congress for such changes?

MR. DOERFER: Well, we have—and before I answer that, I would say some years ago when Benny Friedman was graduated from the University of Michigan, I guess he played with the Chicago Bears, and in his first game they had him go through left tackle. Cal Hubbard was playing left tackle, a great big fellow. Of course, Friedman hit him and down he went. So they decided to put Benny through that same place again and, of course, he hit Cal Hubbard and down he went, and he said, "Let's try that other play we have got."

(Laughter.)

MR. DOERFER: I am going to answer that, but let's try some of these other fellows here.

(Laughter.)

MR. DOERFER: I would like to say that, yes, we have gone to Congress and were trying to knock out the 309(c) protest. For those of you who don't know what 309(c) is, it just makes another attorney general of anybody who can come in and tell us we can't do that or that because he is going to be economically injured, and because he can be economically injured he can be an attorney general, and tells us how to conduct our cases and be in the public interest.

That is quite a frustrating experience, if any of you have ever been in on it.

I think, though, that fundamentally, with respect to specific legislation, you can propose all you want, but until Congress, and until the Bar Association—and I may be stepping on some toes today—until you reorient your thinking and go back to fundamentals and realize that an administrative agency was created, formed and envisioned in whatever steps accounted for its development, it was because it was to expedite a certain type of thing which Congress couldn't handle, and now more, and more, and more, it is getting back into the court procedure.

I don't quarrel with the courts. I don't quarrel with making the court procedure out of an adjudicatory proceeding, excepting that if that is what it is going to be, for goodness sake don't impose upon the agency the responsibility of trying to walk arm in arm with industry and in exploiting some new-found resource or some fundamental resources of this country.

If we are to understand an industry, we have to get in with them, and we have to move. If delayed justice is no justice, certainly an administrative agency delayed proceeding is worse than none at all, in my humble opinion.

I think the Bar Association has got to realize that there are certain functions, there are certain practical problems, which require a practical solution, and you cannot fit it into the judicial mold. It should not be there, to start with. You have got to have some leeway; you have to have some expedition.

MR. DEALE: Chairman Doerfer, I think the point you have made about calling another play is a good one, although I must say I do it reluctantly. I am sure my audience here shares with me the feeling that we could go on in a most interesting fashion for a long time on the problems of the FCC.

On the other hand, we have two other agencies whose procedures we would like to discuss, and time is moving along.

We are next going to proceed with the Federal Trade Commission, and our procedure will be along the lines of the one which we followed in examining and discussing procedures before the Federal Communications Commission.

Our first speaker is a well-known hearing examiner before the Federal Trade Commission.

PRE-HEARING PROCEDURES AT THE FEDERAL TRADE COMMISSION

By Frank Hier,
Hearing Examiner, Federal Trade Commission

First of all, I had better make it clear that what I say here today does not represent the views of the Commission, because I don't know them either collectively or individually; nor does it represent the views of the other hearing examiners down at the Federal Trade Commission—there are eleven more of us down there—because we never have a chance to get together. I don't recall a single day when all of the hearing examiners down there were in Washington at one time; travel and work make it impossible.

That is in partial explanation, if not excuse, of ears and sensibilities being assaulted by a personal pronoun—I can only speak for myself.

So far as the rules go, the Commission had no pre-hearing conference or no pre-hearing procedures whatsoever until the passage of the Administrative Procedure Act in 1946, except the rule to admit the genuineness of the document.

In 1946, the Commission set up a rules committee, and that rules committee adopted simply the language of the Administrative Procedure Act which provided that the hearing examiner could hold conferences for the settlement, simplification of issues by consent of the parties.

That last phrase annoyed me very much, because pre-hearing conferences are all to the advantage of a hearing examiner.

At the present schedule of pay rates, I can't say that our time is valuable, but it certainly is scarce, very scarce.

I will give you a sample: During the months of September, October and November of last year there were 62 working days, two of which I was down with the flu bug; but in 47 of those days I was in hearings in eight different cases, mostly out of town. So my interest in cutting down trial time is obvious.

The Rules Committee in 1954, somewhat due to my insistence, adopted a broader rule that read:

> "The hearing examiner may at his discretion direct counsel for all parties to meet with him for conference to consider"—this is without consent—"simplification of the issues, necessity or desirability of amendments to pleadings, subject to the provisions of the Amendment Rule, stipulations, admissions of fact and of content, and authenticity of documents, limitation of the number of expert witnesses, and such other matters as may aid in the disposition of the proceeding.
>
> "Pre-hearing conferences in the discretion of the hearing examiner may be stenographically recorded, but shall not be public unless all parties shall agree."

That one I never understood.

> "The record shall show the matters disposed of by agreement in such pre-trial conference. Subsequent course of the proceedings shall be controlled by such action."

It is striking, it seems to me, that that rule is not good. There is a distinct apathy on the part of counsel in the cases which I have had in the past ten years toward pre-hearing conferences. I have called a number of them on my own motion and for my own selfish benefit, because some of these cases we handle are lengthy.

I might say at the outset that there is a considerable volume of false and misleading advertising cases, mislabeling or failure to label Wool Act products and fur products in which a pre-hearing conference is a complete waste of time, because most of those cases can be disposed of in from two to ten days. A great many of them are settled.

But when you get into the anti-monopoly field, the anti-trust field, the picture is entirely different.

During the past ten years, when a single counsel for the re-

spondent has ever requested me to hold a pre-hearing conference, I have done so. I may be wrong on one or two occasions, but it has not been often.

I have had requests from counsel supporting the complaint, as they are designated down there, because it is essentially a prosecuting agency and not a licensing agency, but they have been relatively few, also.

Why this apathy, I cannot understand. Perhaps Mr. Dickey down at the other end of the table will bring that out with some of his questions.

But these pre-hearing conferences are of extreme advantage to me, and I trust to the agency. I have been told that I hold more of them than anyone down there. That is hearsay.

We have a lot of problems in these anti-monopoly cases which could be worked out to save time beforehand, and that is what I have been doing.

When an anti-monopoly case complaint comes downstairs and it looks to me, especially when it is a Robinson-Patman Act case or a price-fixing case, that a large amount of documentary evidence will be offered by Commission counsel, I inquire of him if that is the fact. If it is, I call a pre-hearing conference on my own motion, and possibly over objection, and ask him on the record if he has a large volume of material to subpoena by duces tecum from the respondent.

If the response is, "Yes," then I tell him to prepare subpoenaes immediately, and immediately then set a return date on them, because I have had the experience time and again of going out to Chicago, or Oklahoma, or some other place, and having a respondent come in with two or three file drawers full of invoices; then you have the inevitable request for an adjournment for a day or two, three days, or what not, while he goes back and examines those in the hotel room.

All that time is lost; I can do nothing within that time. So I have them returned well in advance of trial date.

I also usually order the counsel, either on the record or by separate order, to arrange his exhibits, mark them in accordance with the rules, and get up a list with the exhibit numbers and a thumbnail description.

It is surprising, indeed, that experienced counsel for some reason or another cannot leave out controversial matter in the description of an exhibit.

Also at a pre-hearing conference we try, that is, after these exhibits have been marked and a list given to the other side, to get authenticity stipulations. Of course, that has to be by consent. I must say I have not been too successful in that respect.

If a case is what the former Chairman described one time as a peripheral case, to-wit, plowing new ground, I guess, then I sometimes ask counsel on both sides in advance of the hearing to give me a memorandum of the points on which they rely, with the cases which they claim support those points.

Sometimes the Federal Trade Commission wanders into fields which are strange to me and, I assume, strange to counsel, and I would like to have that in advance.

Copies of proposed exhibits I will order exchanged, if they are not too voluminous. There is a case pending down there now in which the Commission has some 1200 documents. Now, to photostat those for seven different lawyers would not only flood the mechanical capacity of the Commission, but would result in still greater delay. It depends upon the case.

Next we come to that difficult question which is demanded by respondent's counsel, are we going to get a list of witnesses, and that poses a very difficult problem.

I have followed a procedure which is both stupid and cumbersome, but I do not know any better one to adopt. There have been occasions down there in the Commission where lists of witnesses were given to respondent's counsel, and the district sales managers, and what have you in the respondent's officialdom, and it has caused severe cases of amnesia to develop evidence from those witnesses when they are summoned. You have to weigh the public interest. So I usually ask counsel or direct counsel for the complaint to furnish the other side with lists of witnesses who are non-controversial or non-competitive—that is not a very good expression—but especially those witnesses that come from the respondent's own organization or expert witnesses, those who testify on an opinion basis only.

I leave it up to him as regarding the public interest not to furnish any witnesses that he thinks might be subject to pressure, not pressure necessarily from respondent's counsel, but pressure from respondent's officials or the commercial grapevine that exists.

So that when we get to a foreign place of hearing, such as Boston, counsel for the respondent says he is taken by surprise and he cannot adequately cross-examine, because he may have in

his files some material which bears directly on the witness' credibility or the statements he has made on direct, and we recall the witness at a subsequent date.

I say that is stupid and cumbersome, but with the public interest involved, I do not know any better way to do it. Perhaps somebody can suggest it.

That is what I have been doing. I don't know what the other examiners have been doing, because I don't have much time to talk to them. It has worked out very well in saving trial time on the road.

My experience down there has not been too good with reference to having these cases properly prepared. It may be due to the fact that the Commission operates on what they think, and certainly I think, is a very limited budget. Investigations are not as complete as they probably should be. But, if you have those limitations, you cannot avoid them.

Now, some of the other points that are listed here on this agenda:

Bills of particulars are solely within the discretion of the hearing examiner. I might say that the Federal Trade Commission delegates practically complete authority to the hearing examiner. The only contact I have with the Federal Trade Commission is when they reverse me. We handle a case from start to finish.

With bills of particulars, I have always been told that I grant them more frequently than any other hearing examiner down there. I don't know whether that is so or not.

First, I look at the complaint. If it doesn't make sense to me, the bill of particulars is automatic; if it does make sense to me, I try to put myself in the position of the respondent's counsel and see if he has sufficient particularity with which to defend the case.

Now, depositions and discovery. We have a rule on depositions providing that they may be taken at any time. I have never had a request for a pre-hearing deposition. But we are unfortunately in this position:

There is an old case in the Seventh Circuit, *Buchsbaum*,[1] and a subsequent case in the Eighth Circuit, *Gamble-Skogmo*,[2] which hold, the two of them together, that the respondent's counsel or, in fact both counsel, are entitled to have the hearing examiner

[1] *Buchsbaum* v. *F.T.C.*, 160 F.2d 121 (1947).
[2] *Gamble-Skogmo Inc.* v. *F.T.C.*, 211 F.2d 106 (1954).

who writes the decision view all of the witnesses. Therefore, depositions have to be taken by consent. I have tried many times to get counsel to agree to take depositions of some one witness out in California, or two or three witnesses in Portland, Oregon, or some other place, and my efforts in that direction have met with complete failure. For some reason or another, they just want me to look at the man, and so you just have to go. Depositions are not very much used down there.

Discovery: The Commission has no discovery rules, and does not follow the Rules of Civil Procedure. I understand—and this is hearsay, again—that at one time Commissioner Mason tried to get the Federal Rules of Civil Procedure adopted down there. It is also hearsay that that effort was unavailing.

I don't know whether that is so or not. They never adopted the rules, and they do not have discovery in their procedure.

Notices to admit have been in the rules for many years.

Now, the Jencks rule: The Commission has got several decisions on the point in these oil cases, and generally they boil down to this, that if the witness on the stand has given the Commission a signed statement, that must be produced, and I order it produced.

If, on the other hand, it turns out, as it usually does, that the witness on the stand has talked to an investigator of the Commission, and the investigator has made a signed written report to the Commission, that report will not be produced, because it is, first of all, hearsay; and secondly, it is really a summarization of what a stranger to the lawsuit has made of the witness' statement.

I don't think there is any other point that has come up on the general rule. I do not think of any at the moment.

QUESTION AND ANSWER PERIOD

MR. RAYMOND DICKEY: Why is it that you limit the list of witnesses, but you have a deposition rule which says, "Good cause being shown, the testimony of any witness may be taken by deposition."

If you can't find out their names, how are you going to take their depositions?

MR. HIER: You can't.

MR. DICKEY: Well, you are anxious to shorten the proceedings and the problems of the trial examiner. You say that under the rule in the—what was it, the *Gamble* case?

MR. HIER: *Gamble-Skogmo.*

MR. DICKEY: Thank you. You say that under that rule that the hearing

examiner must be present for the testimony of a witness. But wouldn't it shorten and lighten your burden considerably if the counsel supporting the complaint, as well as the respondent's counsel, could take the depositions of witnesses for purposes, perhaps, of later impeachment of that same witness, or at least to see that he told a consistent story, and in that manner both counsel would know which witnesses, at least, not to put on, or what the danger of putting them on would be?

Perhaps you would shorten up your procedures considerably by not having those witnesses appear before you, or at least having them called and having a rather pointed examination of them from the previous deposition.

MR. HIER: I agree with you, Ray, that that would shorten it. But, as I say, with those two cases, which are both Federal Trade Commission cases, both sides have to agree to this deposition business, and I have never found them willing or agreeable to it.

Nobody would prefer more than I to have counsel in support of the complaint furnish the other side the list of all witnesses, but we have had the sorry experience that I have pointed out. I could give you the cases, but I do not think they would add anything to this discussion.

That has happened, and competitive pressures do exist in these anti-monopoly cases. They are virile pressures; they do happen, and I have to consider the public interest.

I would prefer that both sides exchange lists of witnesses, but I don't think that I can do it and run the risk of what is the truth, or what is supposedly the truth, being suppressed.

MR. DICKEY: But you have anti-monopoly cases brought by the Department of Justice on civil actions, and there the Federal Rules of Civil Procedure regarding discovery and depositions apply. Have they had that same problem?

MR. HIER: I cannot answer that question; I don't know.

MR. DICKEY: If it is applicable there, why shouldn't you be willing to do it before the Federal Trade Commission?

MR. HIER: If I were on the Commission it would be a different story, but I am not on the Commission. It is up to the Commission to adopt or refuse to adopt the Rules of Civil Procedure.

MR. DICKEY: One further question, and then I will stop.

This is a discussion regarding the pre-trial discovery role of the examiner, and pre-trial discovery completely.

Has the Commission given any thought to stopping the practice of issuing a press release blasting the potential or the actual respondent, which comes out even before the respondent gets the complaint?

MR. HIER: I cannot answer that question; I don't know anything about the propaganda department down there.

MR. DICKEY: Mr. Chairman, I can't duel with Mr. Hier. I think we had better let someone else do that.

MR. DEALE: Thank you very much, Mr. Dickey.

I invite now any other members of the panel to raise questions for Mr. Hier's consideration.

If not, I invite any person in the audience to pose a question, or make a comment, if they care to.

MR. COX: May I make a comment? I am one of Frank Hier's associates, and not so badly scared of him as some of the counsel.

Frank and I agree more frequently than we disagree, but two things that he mentioned I want to comment on.

I have found the pre-hearing conference very, very valuable in a lot of cases. The difficulty I have found, and I experienced this more when we first instituted the pre-hearing trial conference procedure, was that the respondent came in, having had experience with the pre-trial practice in the courts, prepared to lay his cards on the table and come to some definite conclusions.

Counsel in support of the complaint would come in and discuss the matter generally; you could get no frank statement out of him. And after the pre-trial conference he wanted to take the matters discussed back to his superior officer to find out what he could do.

Well, under circumstances like that, a pre-trial conference is futile.

If you can get both sides to come in and lay their cards on the table, you can do some good with them. That is one of the difficulties we have had with reference to the pre-trial conference.

The other thing I wanted to express is that my experience with reference to the disclosure of the names of witnesses in advance is completely different. In the *Gulf Oil* case, which is still pending, I issued an order requiring counsel on both sides to disclose in advance of hearing the names of witnesses, and to present in advance of hearing any documentary exhibits which they had.

That ruling of mine was appealed to the Commission, and the Commission supported my ruling.

In making that ruling I pointed out what I think are the safeguards to that, that the statutes are very stringent as to what can be done to anybody who attempts to influence a prospective witness, and I have not had that experience, that anybody from the respondent's side, or from either side, has approached a witness in advance of his appearance in trying to influence him. I think it is a good practice; it helps a lot.

I had one experience just recently in which we had difficulty with reference to the advance exchange of exhibits. There was a document put out of some 212 pages covering nine chapters, involving nine different subjects, put out by the Southwest Research Institute of San Antonio, Texas, which seemed to contain valuable evidence in support of the issues, or relating to the issues created in the proceeding. Instead of exchanging and procuring a copy of that sort and giving it to the other side, counsel suggested to the other side that by writing in they could get a copy.

The other side did write in, and they did get a copy, but when we came to the hearing, the copy that was offered in evidence was a typed copy of 212 pages. The other was a printed copy of about 106 pages, with paging different and the subject not completely discussed in the same manner.

In other words, it seems that the printed copy was a final copy.

Well, the failure to comply with the rule threw our cross-examination clear out of kilter. The respondents had prepared on the basis of the printed copy and could not very well revamp their questions, without more careful study, to apply to the typed copy.

I think the rule is good. I think that is one thing that demonstrates it is a good rule, and there is nothing in the Commission's policy, as I understand it, to prevent the hearing examiner from requiring it.

With reference to bills of particulars, I would like to give you one experience, and I think that emphasizes the reasoning for Mr. Hier's rulings that bills of particulars should be granted wherever possible.

The Commission has had a policy, not very firm, with reference to the granting of bills of particulars, but I found out they worked whichever way the examiner goes.

In one case in which there was a very involved complaint, the respondent's counsel filed a motion for a bill of particulars, but the particular counsel had been at one time a chairman of the Federal Trade Commission. Based on the past policy during the time that he had been chairman, I denied his bill of particulars and told him I hoped he appealed it, and I wished he would be successful.

He did appeal it and was not successful, and I was burdened, and am still burdened with a complaint that nobody knows the breadth or length or depth of it.

Since then I have been granting bills of particulars, and the Commission has gone along with me. So I suffered by my own attempt to get a firm statement from the Commission. But I think I know now what their policy is.

I have not kept any records on matters of that sort, but that is one way we do find out what the Commission's policy is, and I think I have a couple of pending decisions now which I think I will find out more about.

I just wanted to supplement Mr. Hier's statement to that extent.

MR. DEALE: Thank you very much, sir.

MR. BENJAMIN: I wanted to add an addendum to Earl Cox' remarks about the *Gulf Oil* case,[1] about his remark about trying to find out what the policy is, because as I remember reading the Commission's Order on that interlocutory appeal, they said that Mr. Cox' ruling was not an abuse of the hearing examiner's discretion, so you still don't know whether they approved it or didn't approve it. They stated it was within his discretion.

I would like to ask Mr. Hier whether the reluctance of experienced counsel in pre-trial to enter into stipulations is not possibly accounted for by not knowing whether the Commission is going to go back on the stipulation.

MR. HIER: It is very possible, very possible; but I cannot say what their reluctance is due to.

I have observed this, Mr. Benjamin, that full-time general counsel of a respondent, or a general counsel who is a member of the firm, representing them as general counsel, I found to be very cooperative as a rule. But, there is a type of lawyer who, through Madison Avenue techniques or otherwise, has become known as an expert in the field, and general counsel sometimes hire that type of lawyer. That type of lawyer is completely uncooperative. I don't know whether it is because he is paid by the day, or what it is. I have had no success with that type at all.

MR. BENJAMIN: I meant to imply a certain reasonableness on the part

[1] FTC Docket No. 6689 (Feb. 28, 1958).

of counsel who were reluctant to stipulate, because if you take Commissioner Mason's dissent in the *Carnation* case [2] as accurate, and I don't know that it is or not, the counsel supporting the complaint had had the benefit of his part of the stipulation, or, as Commissioner Mason said, he swallowed the quid and now he tried to regurgitate the quo.

MR. KINTNER: I feel compelled to say with respect to the *Carnation* case that there was a logical basis for what I understood was the Commission's decision in that case, and that is, that the public interest would have suffered in the view of the Commission unless all the facts were brought forward and put on the record, and the Commission arranged that that be done.

I don't see anything wrong with that. I think it is inherent in the administrative process.

MR. BENJAMIN: May I say that doesn't seem to me to explain it, because I don't know why counsel should ever stipulate to limit proof in return for a benefit he confers on counsel supporting the complaint if the Commission can then say that any limitation on proof which makes it more difficult for counsel supporting the complaint to win is against the public interest.

I mean, if they are right in that, why should counsel enter into a stipulation with any confidence on any limitation of proof. He gets up something and gets something else, and then he suddenly finds what he gets is lost simply because counsel supporting the complaint says that he can't win his case unless he goes back on the stipulation.

The opinion of the Commission could be based on the *Lorrilard* case in the Fourth Circuit where the court said it was all right to withdraw a stipulation where it had been entered into through inadvertence or mistake.

I don't know who the hearing examiner was in the *Carnation* case, but the hearing examiner had approved the stipulation when it was made and refused to authorize counsel supporting the complaint to withdraw from it when he sought to do so, so that there was certainly merit on the respondent's side there.

I don't know the case and I can't go any further, but, as I read the Commission's ruling, it is simply that the public interest consists in enabling counsel supporting the complaint to win.

MR. KINTNER: Well, I can only say that in my judgment, Mr. Benjamin has unfairly characterized the Commission's decision. If they had said that, I presume that there would be no question about some court reversing the Commission on it. But that was not the decision of the Commission, as I understand it, and this improvidence of counsel in failing to provide facts which exist, and later come to counsel's knowledge, cuts both ways.

The rule should be equally applicable to counsel for respondent; if he enters into an improvident stipulation of facts, I think he is entitled to be relieved of that agreement in the interest of justice, and in the public interest, in getting all the facts on the record, so that a proper decision can be made.

MR. DEALE: Let's close the *Carnation* case for the time being. I think we might proceed with something else.

Now, there was a gentleman in the back there that had a question.

---

[2] FTC Docket No. 6172 (March 14, 1956).

MR. AUSTERN: This is to Mr. Hier.

If the Commission pleading is duplicitous, why not entertain a motion to dismiss and have it over?

MR. HIER: Say that again.

MR. AUSTERN: If a commission pleading is duplicitous, or foggy, why not entertain a motion to dismiss it?

MR. HIER: Why not file a motion to get the whole thing cleared up. I don't see any point in dismissing it, if you don't understand it.

MR. COX: May I answer that?

MR. HIER: Yes.

MR. COX: I have had both.

MR. HIER: Yes.

MR. COX: I have had a bill of particulars which I granted. Right now I have a motion pending before me to dismiss, because they say it is still foggy, so I will have to entertain that motion. What I will do with it—

MR. HIER: Mr. Austern, there are a lot of foggy pleadings in certain aspects of complaints, but the complaint, as a whole, is not generally so foggy that I can't understand it.

You may recall the *Doubleday* case. In that one they failed to file a motion for a bill of particulars, and it would have been granted on Count 1 if they had, and it would have been the end of the government case if they had. But they did not file one.

I don't think that is any ground for dismissal, unless the fog is so thick you can't tell whether jurisdiction exists or not.

MR. DEALE: Thank you, Mr. Hier.

MR. SOMERS: I want to go to the subject of Jencks, but before I do, I want to make a few comments.

I am Al Somers. I am a hearing examiner for the National Labor Relations Board, and we have problems similar to the Federal Trade Commission. Of course, we don't have an enormous amount of exhibits which makes this absolutely imperative, but my own feeling is there is normally resistance on the part of the respondents, as there is by a defendant in a negligence case, or a defendant in a criminal case, to lay his cards down before he knows what the prosecution has, and if the hearing officer pushes for a stipulation, there might be a suspicion of bias. But I want to pass to the *Jencks* case, which is more important.

I think that the rule as applied, as indicated by Mr. Hier, is sound, that is, to say the *Jencks* decision should apply to administrative agencies, and it took a Court of Appeals' reversal of the Board to persuade them that it does apply.

But you do have another situation where a witness on the stand has not only given a statement to the examiner or the Government official, be he an employee of the agency, but he has given it to a private party who has brought the case before the agency. Before the National Labor Relations Board it would generally be the charging union or the charging employer.

They would get a statement from the witness, and then they would bring that witness before the Board in filing their charges.

Now, I had a case in which it developed that the witness, before giving a statement to the Board, gave two statements, two separate statements, two

different times, to the union, and I directed the union which was a party to that, to produce their statement, and I was reversed by the Board on the Hickman and Powell doctrine, that these were working papers of the union and trial counsel, which may have made some sense if it was a pre-trial deposition.

But when the witness is already on the stand and being cross-examined, obviously working papers are not—they are relevant to the proceeding.

Now, it won't come up, because it has become academic, but that is something perhaps which Mr. Hier and the agency should, or might want, to give attention to, if they have a similar kind of situation.

MR. HIER: No.

MR. DEALE: We will now proceed with our discussion of CAB matters in the pre-hearing period.

PRE-HEARING PROCEDURES AT THE CIVIL AERONAUTICS BOARD

By Seymour Wenner,
Former Chief, Legal Staff, Routes Division, CAB

Before beginning, may I say a word in tribute to the late Justice Bolitha Laws. It was Justice Laws who really originated and pushed hard for the development of pre-trial conferences in the United States. He pushed it at every possible occasion, buttonholed every judge he could ever find.

Those of us who took his course, I think, learned a good deal about how a trial can be better managed to the extent that one makes use of pre-trial.

In other words, pre-trial is not simply a device; it is a device that has advantages if it is skillfully used. If it is not properly used, it simply is another procedural step that the parties go through without leading to much gain.

I think, if I may be presumptious, that too much has been said about the necessity of shortening records. I think the real question is: After you have 20,000 pages, do you still have a good record.

There are some cases where it is worth 20,000 pages, but the terrible thing is to come up before an oral argument before the Board and to find that the Board has really become interested in something that the parties haven't thought about, and that happens a little too frequently.

I think that the reason for this is partially the fault of the parties, and I think to some extent, the nature of the administrative

process that Chairman Doerfer has suggested this morning, but I think it is also due to the Commissions, themselves.

I think in some fields they can lay down more definite standards. I don't think that justice can be whimsical. I think that there is a public interest factor in the knowledge of the parties and the public that there is a sound basis for decision, and that he who goes before this Commission can rely upon that Commission's deciding consistently on the basis of similar sets of facts.

I know it is difficult to present similar sets of facts, but I think you give up the whole notion of law if you don't insist upon trying to base your decision upon consistent standards.

Now, how can you use pre-trial to your advantage? I think that is the important thing for the practitioner, and for Commission counsel, too.

I think pre-trial works best when the parties have prepared for the pre-trial conference, when they have thought about what they are going to try to do, and why they are going to do it, and when they come there with an overall plan about how they want to do it in the case.

I know of one practitioner before the CAB of whom it has been said that his brief to the Board is written before he goes to a pre-hearing conference. I don't know whether that is true, but he tries his case that way. And if you look over one of the records in which that practitioner has participated, you can see that at the very beginning, when he made a request for evidence, that that had some basis in what he was going to do later on.

The difference between, I think, the good lawyer and the ordinary practitioner is this: that the good practitioner has figured out in advance exactly what he needs. In short, he has a sense of relevance. The sense of relevance is the quality that ought to distinguish a lawyer from a layman.

I think the most important thing in a hearing is a sense of relevance on the part of the participants, and an examiner who is willing to enforce it.

Let me take up just for a moment the procedure in the most important type of pre-hearing procedure in the most important type of CAB case, a route case, and let me say by way of qualification that in a compliance case, there is very little pre-hearing procedure.

You can file a bill of particulars by a motion to the Board, and at times, in a compliance case, that is granted. But in general,

people go to hearing in compliance cases without knowing too much theoretically about the other's case. In fact, I suppose they rarely do.

Compliance cases are rarely brought before attempts are made to settle, by the CAB, at any rate. At the CAB when a route case is set down, there is a notice which is published in the *Federal Register*, and is available to all members of the CAB Bar, because it is posted on the bulletin board. This sets a date for a pre-hearing conference, and it lists the general area of applications that are to be considered.

In other words, in every route case you get a pre-hearing conference.

In the matter of procedures, the CAB is perhaps, I would think, the most advanced agency in adopting pre-trial techniques, and we have had them for a very long time. At the pre-hearing conference the parties attempt to state the issues in terms of the applications that have been filed, and also in terms of applications that they filed right at the pre-hearing conference.

This is a problem that is raised: A person can add an application by motion made up to the pre-hearing conference; hence, with respect to that application, the other parties have no preliminary knowledge of what he is going to do, and they are not prepared for that, unless they can anticipate it, and I think a good practitioner should anticipate what is likely to be asked for by way of consolidation at that conference.

Requests for evidence are made at a pre-hearing conference. I would say most of these are much too elaborate, because the parties just ask for them without any real sense of knowing what they are going to do with them.

I think it would be an improvement if every person making such a request for evidence at the CAB were required by the examiner to state what he proposes to do; if he received his evidence, just what type of proof is he going to use it for. I think that would cut down some of the requests, and some of these requests are pretty burdensome to the CAB. They may require a party to produce enormous amounts of data.

The third thing that is done at the pre-hearing conference that is most useful is to set down what I might call the law of the case. By this I mean certain procedures that the examiner is going to follow in this case.

Now, some of our examiners do this very skillfully and firmly.

For example: In a case decided last year, the examiner required every party to state precisely what non-stops between which points he was going to ask for.

The examiner may also require written testimony. I think there have been problems about which people can be compelled to comply with these directions.

In general, if the examiner is firm, he gets his way, and in a route case he has a tremendous advantage, because if the party is an applicant, he doesn't want to get the examiner annoyed; if he is a respondent, he also doesn't want to get the examiner annoyed, and I think this is a legitimate kind of pressure.

I don't know that it affects examiners' decisions, but I think the fact that it is in counsel's mind as a factor is something that is perhaps the most important sanction there is.

I think there are actual sanctions. I think the Board has powers in various sections to require such evidence to be produced, and I think this, in effect, has been delegated to the examiner, and the examiner also has the power to require subpoenaes.

At CAB, I would say that the request for evidence is more useful than a subpoena, because the request for evidence requires somebody to produce something in usable form, whereas you can request something that makes him develop it. The subpoena, as you know, can only be made for a document that is actually in existence.

I would say that the rule that leads to the most difficulty, the greatest difficulty, and makes a pre-hearing conference less effectual, is the fact that the consolidation order is not issued before the pre-hearing conference. I would suggest that it would be better if the Board set down for hearing, just as it does now, a notice of intention to hold a hearing with respect to certain applications that have been filed and cover a particular area. The parties should then have the right to file motions to the Board with respect to enlarging or contracting their area.

I think that the Board should then decide the scope of the hearing, and I think this should be a matter on which the Board's staff actively participates, namely, that this is a policy decision; what area do we wish to cover; do we desire to determine whether further service is needed.

This is not an adjudicatory problem. I think it is basically a policy decision of the Board to determine. We have a lot of cases,

we cannot hear all of them; where do we think there is service needed that we should hear first.

At the present time this decision is made on recommendation of the examiner after the pre-hearing conference. I think it is really not an examiner's function to determine the scope of the hearing. I don't think there is anything wrong about it, but I think it is more of a policy matter, and I think the examiner's time, energy and skill can be used more profitably on determining matters which actually fall within the scope of the hearing.

I would say the second consequence of this is that parties are not well-prepared because they are not sure enough of the scope of the issues at the trial at the pre-hearing conference. I would say that parties are not often well-prepared at our conferences because too often they act as scouts rather than lawyers; they are there to see what is going on, and this does not make for a good pre-hearing conference.

So, my first suggestion would be that a consolidation order be filed first.

I believe very strongly that direct testimony in CAB hearings should be required in writing; I think it saves a great deal of time. But I think unless the examiner firmly adheres to this rule, and if he permits parties to take exception to this ruling, and to put their evidence in orally, then he penalizes the parties that have complied with his procedure.

I think there is an advantage in giving your testimony orally; I think it impresses itself a little better, and so you have got to avoid the danger of having people who do not comply taking advantage and getting a better shake.

A third requirement should be, I think, that every exhibit be self-explanatory, and I think it should contain a statement of purpose. Some examiners do this; others do not.

I would go so far as to amend the Board rules to require this. There is nothing more horrifying than to look at a CAB exhibit, sometimes of five pages, with absolutely no conception of how in the world that was made up, what it is supposed to prove, or what the party is going to do with it.

A great deal of cross-examination is frequently wasted on just how did you make up this exhibit, and not having the advantage of the knowledge of this in advance, the party cannot properly prepare and construct his attack upon the exhibit.

I would also limit cross-examination. There is a good deal of

cross-examination that goes on at CAB hearings that sounds quite effective when you hear it, but when you read the record, you are sort of puzzled as to why you were impressed with this.

I think I would require, or certainly permit, that rebuttal be made directly after each witness has testified. I think rebuttal by an expert on the technical problems is far more effective in the long run than cross-examination, and I would interrupt the hearing, after a witness or a party has testified, to permit rebuttal on the points the witness has raised, and I would severely limit cross-examination by offering the party rebuttal.

Now, I think there are problems in limiting cross-examination too far, but I think an examiner who is firm and forceful can point out that this can be done more skillfully on rebuttal. It is a technical subject, and I think he can reduce it if he offers the party the route of rebuttal.

I would require a trial brief. I think that if a lawyer were forced to put in what he intends to prove, he wouldn't put so much in, because some of it might sound a little silly.

I think we have a problem that somebody raised, the gentleman over there, earlier: Suppose the Board decides on some other issue than what we put in; therefore we have to put in everything.

I don't know any other answer to this than these two suggestions. If the examiner adheres to his plan of what is relevant in the proceeding, and has clearly excluded evidence on other matters which he considers extraneous, I think the Board would find it very difficult to make a decision without reopening the case, and I think that is the best protection in that sort of matter.

I would go much further on official notice than we currently do. Some examiners have gone very far on this, on taking official notice. At CAB, we have the peculiar business of stipulating certain Board material, traffic figures that have been compiled for years, are stipulated. These are published every year by the Board.

When I first came to the CAB as a bureau counsel, one of my main jobs was to induce people to sign this stipulation, and they were quite reluctant about it. They said, "Why should we stipulate"—incidentally, you stipulate to matters that will appear in the future, and they said, "Why should we do this? How do we know what the statistics are going to show in the future? How do we know the method of compilation will be accurate," and I thought they had a pretty good case, although I spent a large part

of my time trying to kid them and cajole them into signing these stipulations.

We don't take the trouble of having them signed. The examiner just as a rule says, "I am going to have stipulated into this record the following items, unless any party objects."

I don't quite see the point in this. I don't see why the Board can't do what the Interstate Commerce Commission has done, namely, list the following items which are required to be filed with it, and which it publishes, and say, "We will take official notice of these and other similar Government documents."

In closing, let me say that I think the attorney who prepares his case well, who relies on pre-hearing techniques to get information at an early stage for what he knows he will need later, who builds his case around a central theme, a reasonable theme, but which is evident from the day he starts until the day he makes that oral argument before the court, gains an immense advantage over the ordinary practitioner who just drifts along.

QUESTION AND ANSWER PERIOD

MR. DEALE: We will now proceed with questions from the panel, and the leading interrogator is Mr. William C. Burt.

MR. WILLIAM C. BURT: One of the things that interests me about CAB procedures is essentially this: that I think the CAB uses virtually all the pre-trial techniques. It does have pre-hearing conferences; stipulations are widely used; information requests are generally enforced by examiners; subpoenaes are liberally used. There is an exchange of exhibits so that you are not taken by surprise. In most cases, written testimony is exchanged in advance.

All these things the good examiners at the Civil Aeronautics Board use forcefully to prevent surprise, to narrow the issues, to try to get everything done as expeditiously as possible, and yet, the surprising thing is that the Civil Aeronautics Board proceedings are prolonged and cumbersome and delayed.

There are a number of reasons for this. Among them, of course, is that in the major cases which are tried before the Board, the route and rate cases, the issues are complex, and you can't intelligently solve complex issues without taking a considerable amount of time.

A second reason for it, I think, is this—and which may be involved in this *Carnation* case, although I am not sure—that any attempt to narrow issues and to narrow the case early in the proceedings, leads to either injustice to some of the parties that haven't thought through their case in advance and later want to expand it, or leads to the argument that if you don't expand the issues, if you don't expand the proof beyond what was agreed on in some preliminary stage, then the agency doesn't have the full facts, and the agency needs the full facts in order to decide the case in the public interest.

I think this is a great barrier to shortening proceedings, and as long as agencies decide, and I am not sure they are not right in doing this, that they would rather have all the facts, or they would rather not create injustice by knocking some party out who did not prepare his case early in the stage, you are not going to be able to shorten proceedings very much.

The third reason, I think, that you can't shorten procedures too much in complex cases, is emphasized, I think, by the statement of Mr. Doerfer. Mr. Doerfer says, "There are no clear standards of preference under the Federal Communications Act." and that is true, to a certain extent, in route cases before the Civil Aeronautics Board.

Well, if you don't have clear standards, I don't think you can have clear issues, and if you don't have clear issues, you can hardly narrow the scope of the proceeding.

Then, in the Civil Aeronautics Board practice, there is another reason why procedures are inevitably long, and that is that factual stipulations don't help in the resolution of cases. We are not deciding, and the Civil Aeronautics Board is not deciding, questions of veracity. The important thing in a Civil Aeronautics Board case is not essentially what the facts are; the Civil Aeronautics Board is concerned with whether the conclusions drawn from the facts by expert analysis of traffic and costs and revenue are accurate conclusions, and the trial of the case is basically a trial testing the assumptions of expert witnesses. So you do not shorten the proceedings very much by getting stipulations of fact.

So I don't believe that in the Civil Aeronautics Board procedures there is very much you can do in terms of shortening procedures.

There is one area, and it is the area that I think Mr. Wenner touched on, where I think the Civil Aeronautics Board procedures have been fumbling, and that is the area or the question of defining the area involved in the case.

We don't have nice, clean, television channels where you have three channels in a city, and somebody applies for Channel 1, and Channel 2, and Channel 3. When you start an airline case in a particular area, it inevitably involves air transportation from that area to every point in the United States, because the air carrier is applying for it.

TWA, for example, applies to serve Point A. It puts in issue air transportation between Point A and every point on TWA's system.

Then another applicant says, "Well, I serve Point X, so that I am entitled to be heard on service between A and X, and you consolidate his application. That involves air transportation between Point A and every point on the second carrier's system.

So that inevitably in a route case you can, if you don't watch out, involve the issue of air transportation between the particular city involved and every point in the United States.

This means that one of the most significant problems that the Board faces is the problem of intelligently determining the areas of the case that it will decide. What is the area, how far is it going to analyze the deficiencies in air transportation, and here, I think it is fair to say, that the Board has not done a good job.

One of the reasons is that, as Mr. Wenner pointed out, in starting one of these cases on route patterns, they just issue sort of a general pre-hearing

conference. You just have sort of a vague idea of what the case is about. And then, sometimes as much as six or nine months later, you get a consolidation order which defines the area of the case precisely.

I would agree very much with Mr. Wenner that in this area it would be very well to have a planning staff within the Civil Aeronautics Board which would determine the scope of the case in advance of pre-hearing conference, and which also would determine something that is, I think, one of the forgotten fields of administrative law, the priority in which cases are tried.

To date at the Civil Aeronautics Board this seems to me to be decided a great deal on the squawk test. If a city is squawking about air transportation, it gets heard, and another city isn't squawking, and it doesn't get heard, and I think one of the major improvements in Civil Aeronautics Board procedure could be to have within the agency itself a staff focusing and planning on the timing of cases, and areas of cases.

I would like to ask Mr. Wenner one question, just to be sure:

Would you agree with me that this is the major area where the Board procedures could be improved?

MR. WENNER: Yes, I think that is a major area. I would like to make two comments about that area.

In the first place, I think that a good deal could be accomplished with respect to the Board's time if it decided upon the following rule and made it known in its decisions: that it would not overrule an examiner's finding on the facts unless he were clearly erroneous.

Now, by facts I mean this: How much diversion is there likely to be if a new carrier is put in between Points C and D.

By conclusions I would distinguish, well, what about this? In other words, if an examiner finds that there is likely to be 2,000 passengers, there are going to be 2,000 passengers who are going to be diverted from Carrier A, I think this is a finding of fact that the Board shouldn't go into unless clearly wrong. I think whether you want competition in the light of that is a policy question, and is legitimate for the Board to be looking into quite carefully.

Now, my reason for saying that the Board should not over-rule the examiner on this question is twofold:

First, the examiner has heard the record, and he has heard the testimony.

In the second place, I think we all have to face a problem. The Civil Aeronautics Board cannot read the record in these cases.

I know that the great criticisms of the administrative agencies these days is that they are not like the Supreme Court, they don't try to read the records. Well, I think this is a valid criticism, but I think you have to face the problems of big business and multitudinous affairs. No Commission could read all the records; they have to rely on somebody.

Now, the question is, whose judgment will you rely on, the examiner who read the record, or some other staff member who didn't read the record?

That is the choice.

When a Commission says, or the Board says, "Well, we think the examiner is wrong. He doesn't know how to estimate the amount of diversion," they can't have possibly read the record. What they are doing is saying, "Let's ask somebody else what the diversion should be," and so they consult their

staff, and since by rule the only other two people at the Board who know what the case is about, namely, the bureau counsel who participated in the case, and the analyst who participated in the case, are not supposed to be talking to the Board at that stage, the only people they can legitimately get this information from is somebody who doesn't know anything about it.

I think this is, when you think about it, and when you have lived with it, a pretty strong reason for relying on examiners for questions of fact, and I think it would reduce a great deal of the time needed for decision.

I would add one other point, which I think Mr. Cox made many years ago, that a second pre-hearing conference would be desirable if you are not going to have a consolidation order before the first pre-hearing conference; a second pre-hearing conference, fairly close before the actual hearing, at which time the parties would have the exhibits and be able to ask questions about matters that were unclear, and at which there would be no stenographic record.

I think the stenographic record is one thing that keeps hearings long. Everybody is talking so that he can impress his client, or at times many people are. I do not agree with the suggestion that there should be a stenographic record at the pre-hearing conference. I have been at pre-hearing conferences where there were and there weren't, and I think it leads to a pre-hearing conference where it lasted twice as long when there was a stenographic record.

MR. LEVIN: I would like to comment on Mr. Wenner's remark concerning unduly long cross-examination, a showcase of whether a lawyer has or has not prepared his work.

Coming off a recent experience before the ICC in the passenger deficit investigation, we came up at one time in that proceeding with three different studies by eminent authorities in the field of costing, each on the out-of-pocket costing of passenger service.

Attorneys for all the different parties involved tried to cross-examine each of the witnesses who presented these long studies. We were all pretty much unsuccessful.

The outcome of the whole thing was that the examiner tossed them into a cocked hat and said, "They can't agree; how can we agree on what they are trying to say."

Well, if a lawyer was totally prepared and had full opportunity to read and to study and use his own technical staff in order to prepare competent cross-examination, he will attempt to cross-examine on certain lines which the Commission or the agency's analysts who were attending should appreciate, I think you are better off with what might be very long, very strenuous cross-examination, so that the attorney can point out to the analyst what may be flaws in an expert witness' study or presentation.

By taking one expert witness, putting him on and then saying to the other party, why not put on yours now, they may be talking about the same thing in five different languages. You may be losing the point that you are trying to give to your analyst. You may want to point out to him where Witness X is completely off base, but Witness Y isn't going to be any better in pointing it out to him.

MR. DEALE: Mr. Wenner, would you want to make a further comment?

MR. WENNER: I think on cross-examination on a technical matter, you

get a very occasional question that is penetrating, and I think the most penetrating questions are simply, how did you do it.

I have never seen a witness break down and confess that his exhibit was all wrong, that it was unsound statistically, and that he was a liar. I think you are much more successful when, having made the exhibit clear, you have another witness point out directly what you feel is unsound about the other exhibit, rather than attempting to induce the proponent to admit flaws.

MR. BURT: I didn't comment on the cross-examination comment of Mr. Wenner because I confined myself to the pre-hearing phases. But I want to say as far as I am concerned, I have seen effective cross-examination, and I believe it is a useful tool in this process, and I would take a dim view of any rules which would unduly restrict cross-examination.

It is true that in many cases, as a matter of trial technique, it is better to use a rebuttal exhibit than cross-examination, but that isn't the invariable rule, and I think that it is a very valuable tool in this field, and it helps the Board separate the men from the boys, and I would like to see cross-examination, and good cross-examination.

MR. DEALE: Mr. Sellers.

MR. SELLERS: Mr. Wenner, on the same subject, it is surprising we would have so many questions on this one aspect of it, many that you have covered.

You said that you would have a rule that one introducing an exhibit should have to either state in connection with it or have the exhibit itself state what its purport was, and that it be self-explanatory.

Assuming that it isn't, which, as you say there are so few which are, how can the attorney on the other side possibly do justice to the case merely by rebuttal except through tedious, exhaustive, and in many cases, minuscule cross-examination?

The only suggestion that I would have—certainly rebuttal is not the answer in that case—is that there is a particular instance in which an examiner should inject himself into the case. That that is a peculiar situation with which it seems to me it is the duty of the examiner to do the cross-examining himself in order to make perfectly certain for the record that the exhibit does state its purpose, and that it does—there is explanation of how it was prepared.

That would seem to me a far more proper role for an examiner than to concern himself with the scope of the issues.

MR. WENNER: I don't disagree with you particularly. I think that cross-examination—I am not saying that cross-examination isn't useful; I would say that on reading records I have rarely found cross-examination that was of particular use and which I felt couldn't be done better if the preliminaries had been laid bare by rebuttal.

III. NEGOTIATIONS AND SETTLEMENT

INTRODUCTION

By Sigurd Anderson,

Moderator, Commissioner, Federal Trade Commission

We are here to discuss that stage of the proceedings in the trial of the matter before an administrative body which is known as the Negotiation and Settlement phase.

We feel that this is a very important phase, because of the fact that the deliberations may result in a consent settlement which will short-circuit a great deal of time and expense in connection with the disposition of the matter.

I would like to point out that this matter of consent settlement has received the attention of a number of the members of the Congress. There are those who feel that any consent settlement is somewhat of a hollow victory for the Government in the event that it is entered into. There are those who subscribe to the idea that every matter brought before an administrative agency has to be an adversary proceeding carried out to its ultimate conclusion by means of an adversary proceeding.

I would like to point out that the device and the method of settling cases by means of the consent settlement route has been of tremendous help to the administrative agencies of the Government. In our own Federal Trade Commission we had this situation:

In the matter of antimonopoly orders in the years '55, '56. '57, '58 and up to December 1st of '58, we had a total of 173 orders of antimonopoly orders. Of those, 125 were settled by means of the consent method; 48 were contested.

In connection with the anti-deceptive orders during that same period of time, the years '55, '56, '57, '58, and up to December 1st, '58, we had a total of 710 orders that had been entered, and of those 568 were consent settlements and 142 were contested.

And I would like to point out that this did not result in a tremendous showing of savings in connection with the hours and days that were spent by the hearing examiners in connection with their work, because, at the same time, the increase in the number

of hearing days including pretrial, will show an increase of 7 per cent. Without the device of the consent settlement our work would have been greatly curtailed.

Now I would like to introduce our speakers. As they are presented each one of them will submit to you the procedures that his department or agency employs in connection with consent decrees or consent orders, stipulations on the record, and judgments and so on. He will tell you how they do it over in his shop.

Then his gladiatorial opponent will ask searching questions which will reveal wrong things in connection with that. And then, if you will kindly copy down questions that you would like to ask, we will have them put to the various speakers.

CONSENT SETTLEMENT PROCEDURES IN THE DEPARTMENT OF JUSTICE

By Robert A. Bicks,
First Asst. to the Asst. Attorney General, Antitrust Division, Dept. of Justice

I would make three points:

First, what role do consent settlements play in the civil antitrust fields?

Second, what are their advantages to the Government as well as private parties?

And third, in the consent settlement antitrust field, just how differently from an administrative agency does the Antitrust Division in fact work?

First, the role of consent settlements.

Strangely enough, viewing antitrust enforcement over the past three decades, the percentage of civil antitrust cases settled by consent has not varied substantially. In each of these three decades the percentage of civil antitrust cases settled by consent has ranged between 75 and 80 per cent of the cases filed.

There are two significant factors here. First, that a comparatively uniform ratio has been maintained over a 30-year period and, second, that the ratio has really held pretty steady, about the 3-out-of-4 mark.

Second, what are the advantages of consent settlement in civil antitrust cases at the outset to a private antitrust defendant.

I think the advantages are primarily two. First, avoidance or minimizing civil treble-damage liability.

As you know, the Clayton Act provides that a litigated judgment, as distinct from a consent judgment or precisely a judgment entered after the taking of testimony may be prima facie evidence of violation in a subsequent private treble-damage suit. Settlement by consent vitiates or minimizes this possibility from the point of view of the defense counsel.

The second advantage to the defendant's counsel in the consent settlement, I would say, broadly, operates in the area of saving of costs.

Antitrust cases cost to defend. They cost in terms of money, executive time. Beyond that, I think that there is a definite cutting down on the corporate executives' peptic ulcer rate by avoiding extended, what may be extended unfavorable publicity in the course of a trial, as well as the rigor of extensive examination and cross-examination.

So far as the Government is concerned, what are the advantages?

I would say first, much as in the case of defense counsel, a saving of time and money. The average time-lapse between filing of the case and entry of a final judgment no longer subject to an appeal in a litigated case runs almost 6 years.

This is quite shocking. Steps have been taken to cut that down, and we are quite proud of *Youngstown-Bethlehem* where at least a judgment in the trial court was entered in 13 months after the filing of the complaint.

But contrast that six-year duration of litigated contracts to roughly 26 months or slightly over a two-year length of time between filing of complaint and settlement in the consent area. This saving of time frequently spells an equivalent saving of money and men so far as the Government is concerned.

A second advantage is that oft times the securing of relief could not certainly be secured in a litigated contest.

Often in the antitrust as in other public law fields difficult problems of proof arise. Frequently in the informality of shirtsleeve negotiation problems of proof in difficult areas can be agreed upon or facts can be agreed upon much more easily than they could in the more formalized context of a court proceeding. The result is, as far as we are concerned, serious problems of evidence and proof are frequently minimized by settlement by consent.

On the other hand, there are real dangers I think or real problems that we should keep in mind in terms of utilizing consent

settlement procedures. The primary problem to me is that consent judgments really contribute very little to the development of the law. A consent judgment primarily assures how hard the axe has already fallen rather than where it will fall next.

I think particularly in a field that must constantly grow and adapt to meet changing industry and economic conditions there is substantial risk involved in an undue emphasis on consent rather than litigated judgment.

Now frankly there is, to some extent, whether or not the consent were litigated is beyond our control, and that is I don't think we can take the position in the antitrust field that if a defendant is willing to offer all that we can reasonably expect, competitive conditions require, that we can insist on trial. This is not, so I understand, done frequently in the tax field. I suggest that there is a good basis for the distinction.

That is, the burden of litigation in the two fields is so different that I don't think we, in the antitrust field, can insist on putting a man to trial if, prior to trial, he is willing to consent to all that the Government can reasonably ask for. This limitation on undue use of consent settlements I think should be borne in mind.

Third, I would like to explore with you very briefly in closing the extent to which, in the consent settlement field, the antitrust division operates like a regulatory agency. This is something that has interested me in terms of Governor Anderson's breakdown of his program.

The question arises because of the sparseness of judicial scrutiny of a consent decree.

A consent decree obviously is an order of a court. It has no validity until a judge signs it. However, with only two or three exceptions in the past two decades, consent decrees are generally entered the day they are submitted.

Now I think that time sequence indicates the degree of judicial knowledge of the facts of the industry and the problems of the complaint that are sought to deal with. In that area then perhaps the department and private defense counsel operate, in a sense, the way a regulated agency would. At least it is only in a formal or quite significant sense that the decree is a result of a judicial deliberation for decision.

On the other hand, I think there are four significant differences between a consent decree entered under those circumstances by the antitrust division, and the operation of a regulated agency.

First, unlike any regulated agency that I have seen, our work is, by no means, confined to one industry. The antitrust field ranges from linens and Schubert theaters on the one hand and to steel on the other. This has its advantages and disadvantages. I don't mean to get into the argument about what I feel may be the greatest oversold commodity of our time, expertise.

The second possible difference is that antitrust settlement negotiations in the civil area always take place against the backdrop of potential litigation. A case generally has already been filed. We do occasionally prefile, but generally a case has already been filed.

Both the defense counsel and the Government always have ready recourse to the courts and ready recourse to the courts in a contest where both may be put to their proof with equal balance. In short, there is no presumption of administrative regularity, no cloak which we can use to excuse the burden of proof.

Third, even when neither party chooses to go to court, to prove the facts, after a decree has been entered it may well be subject to scrutiny in other forums where the presumption of regularity not only exists, but in fact may be reversed. So I think those three differences as well as the possible similarity between settlement of civil antitrust cases and settlement in an agency proceeding might be borne in mind.

QUESTION AND ANSWER PERIOD

MR. STEPHEN AILES: I gather from what you say, that your listing of the advantages that these consent decrees have for both sides, that you believe that anything that can facilitate the reaching of these consent decrees should be done, is that correct?

MR. BICKS: Well, I did say they had advantages. I also tried to acknowledge some limitations on undue emphasis on consent. But I will accept at least for the purpose of discussion your feeling that we certainly should explore all means for facilitating consent settlements.

MR. AILES: Let me ask you this. Do you have any preconceived limit on the amount of litigation of this character which should be handled by consent decrees? Is there any top, for instance, that no more than a certain amount of your work should be handled this way?

MR. BICKS: No, I don't think it is realistic to talk of such a limit in terms of percentages. I think it is much more important that cases in significant new areas be subject to court test.

We really learn so much more from a more or less coherent judicial expression on the subject than we do from a simple entry of a consent decree without any conclusions of fact or law.

I would say in direct response to your question, no, I don't have any preconceived limit as to percentages but, yes, I would be very careful of settling short of the most complete sort of relief what are considered to be our most significant law cases.

MR. AILES: That really leads me to another question. There is, you know, talk among the people who defend these antitrust cases, I have heard it said lots of times "This is one case in which the Department will not even discuss a consent decree with you."

I gather from what you just said and what you said earlier that that is not true, is that correct?

MR. BICKS: Yes, it is not true. I don't think we can take that position.

MR. AILES: Let me turn to something else again.

MR. BICKS: But I think candor requires a more complete answer to that. I will say that some cases will be harder to settle than others.

MR. AILES: It is also true, is it not, that sometimes you do bring suits for the purpose of clarifying fields of the law, antitrust law, and you are really quite anxious to go to trial on them. You don't feel, I gather from what you have said, that the relief that you are able to obtain in a consent decree really is of much use as far as establishing law in the field is concerned.

MR. BICKS: I have to say it certainly is of no use, because the consent decree recites that no conclusions of fact or law have been made.

I think that it really indicates how hard the axe has fallen, rather than where it will fall next. And in a field where really effective enforcement depends to such a large extent on informed advice by the private bar to clients, such a decree has real limitations.

MR. AILES: The cover page in this program talks about practical problems. I would like to just mention a couple of aspects from the defendant's point of view, procedural aspects, let me say, of these consent decree negotiations that I think make it a little difficult for defendants, and I would like to have you give some comment on it.

First of all, I have heard it said, and I would like to know if this is correct, when you sit down at one of these negotiations and you start arguing about the facts a little bit, you are very liable to be told that the complaint is to be taken as having been proved or admitted, and that we are going to negotiate on the basis of the facts as they are alleged in this complaint.

That is a little bit different than the way you handle negotiations in private litigation, is that correct, and if so, is that a good thing?

MR. BICKS: It is not correct, so I wouldn't reach your question of is it a good thing.

I would say this: You are told, as I think you must be, particularly in the pre-filing field, that not open for discussion is the issue of whether or not a suit should be filed, because I think very strongly that a prosecuting agency has got no business talking to anyone about what they should or shouldn't do, unless they have suit or are prepared to do so.

So in that sense not open for discussion is the wisdom of suit or its inevitability. Inevitably open for discussion, however, are the facts on which the suit is based, because any informed judgment as to what steps are to be required for promotion of competition or elimination of whatever anticompeti-

tive restraints are alleged indispensable for any sensible consideration of what is a more than sparse knowledge of the facts.

Really that is what most consent discussions consist of. I would say a mutual education and general education going mostly to the benefit of the Government as to what the industry facts are.

MR. AILES: Let me move on. One thing that I know causes defendants' lawyers some grief, I will call it the escalator method.

In private litigation you frequently start some distance apart. Say it is a case that has an amount of money involved, and you work with the plaintiff asking for 20,000, defendant offers 10, and you sort of gradually work towards about 15, and you make some concessions to get there.

You would be horrified if, when you got there, your opponent suddenly said "Now I will change my mind and start at 25 and you stick at 15 and we will give this process all over again."

Now actually when you negotiate, as you are compelled to do in many cases, with one of your field officers, that is pretty close to what happens to you, is it not, that you sort of make an agreement say in Chicago, and then you make some concessions to get that point, and then the next thing you know you are in Washington starting in Washington where you ended up in Chicago.

Now that causes a lot of grief to defendants' lawyers. Is that planned that way or is that just inevitable?

MR. BICKS: Well, I think there is no question but that the facts as you narrate them do accord with my own observation of what frequently happens.

Really the reason that is so I think stems from the way the antitrust division is organized. There is one section whose peculiar responsibility it is to negotiate judgments litigated or by consent.

The reason for that is that it has been found, over the years, that peculiar problems opposed by drafting as well as by the substantive issues of fashioning particular remedies for particular industry situations.

After you have been through five or ten antitrust consent negotiations, you certainly have a more realistic idea of how problems can be solved than you did at your first one.

Therefore our procedure is that initially you meet with the trial counsel who prepared the case, and if it does go to trial, will be responsible for it.

After you have worked it out with trial counsel what may be an acceptable basis for consent settlement, that basis is then referred to Washington where it is considered by our judgment section.

I frankly feel we have fallen down a bit here. What I think we should do is have more coordination between the people negotiating initially and the judgment section at the beginning. This will probably mean, Mr. Ailes, getting the bad news sooner.

But as I gather from your comment, you are not objecting to the nature of the news, but rather the fact that you get different word from different people. So I think this is a real point where our procedures could stand some improvement.

MR. AILES: There is another subject that I would like to ask you something about. This is in the nature of a complaint too.

I am much interested in the question of whether these decrees operate as

precedents, and I do have the feeling a little bit that when you discuss provisions that are going to go in your decree, you talk in terms of what is a good or bad precedent as far as the Department is concerned. Because these decrees are published, and everybody knows about them, and the Department doesn't want to take a position to let you off a little easily in a given situation.

That is the context in which you discuss it. But when you reach back and pull up somebody else's decree and say, "Why can't you do in our case what was done in this one?" you are told that is no precedent at all. That is just another case. There are factors in that which aren't involved in this one "which we can disclose to you," and you just ignore it.

Now as I say, you are in sort of a box there. You seem to be negotiating on one basis in your case, a basis which doesn't hold true as far as these earlier decrees are concerned. What is the situation there? Are these things precedents or are they intended to be precedents in any way at all?

MR. BICKS: Mr. Ailes, I never thought I would see the day when a defense counsel would not argue that each case must be decided on its own. I think that your question can be answered with two points.

First, obviously considering the problem of a decree in one industry, it would make no sense to seal off from your thought consideration of the way like problems have been handled in past decrees.

On the other hand, I don't think you can set any rigid rule about precedent in terms of this particular provision being necessary in this particular decree because we had it in the past. This is so because I happen to believe, as I have heard every defense counsel argue to this point at least, that each antitrust case is different.

MR. AILES: I would like to make it clear I support that proposition completely. I just say you ought to be on the same basis both in your case and in the old one as well.

And that problem carries over into another area which is, it seems to me, an extremely fascinating one in this field, and that is the problem of modifying one of these decrees after they have been entered.

You agree to a provision in that consent decree because the Department takes a strong position that this is the law. This is a rather advanced position on the law perhaps you think when you agree to it on that representation urging for the purpose of closing the case.

Later the law is clarified, let's say by decision in the Supreme Court perhaps or in some Court of Appeals, which makes it pretty clear to us that it is not the law.

You shine up on this provision on the theory that this is really a necessary part of the Department's position that they want to do this, but when you go to the court and ask for a modification, the Department meets you with the proposition that you made your deal back there, and that you should stick with it.

Now this again is the same kind of an inconsistency it seems to me. One is sort of on a generalized basis that the decree is important because of its broad effect, but it also settles the case between the parties and it becomes an entire interparty situation when you get there on modification.

Is that a fair statement, or am I incorrect on what actually happens in those situations?

MR. BICKS: I thought you were touching on a problem which is, I believe, at least quite significant. It now develops that you weren't.

First, I don't think the Government any more than a private counsel can play it both ways. You enter a decree and take your chance. You may, in a sense, later ratify it by a court in terms of an order.

I don't think the Government, if the law later develops beyond the point it was at the time the decree was entered, can reopen the decree and say "Gee, if we brought this case today we probably could have gotten more."

And so on as a corollary I would say I don't think defense counsel can either.

But, second, and much more important is I don't think we are half flexible enough after decrees have been entered for a few years in being willing to take a fresh look and see if really they may not be frustrating, rather than furthering the purpose for which they were designed.

A very provocative proposal has recently been made in one law journal to the effect that antitrust consent decrees should be all limited in time for 10 or for 15 years. I think this is worthy of serious consideration, because first any decree that hasn't done its job after 15 years is never going to do it.

And, second, really when you get into enjoining particular practices, the practices you are enjoining may have an entirely different competitive significance over time. So I think really that problem you are touching on now is one of the most significant in the antitrust field.

CONSENT SETTLEMENT PROCEDURES IN THE FEDERAL TRADE COMMISSION

By L. E. Creel, Jr.,

Legal Advisor, Bureau of Litigation, Federal Trade Commission

We have a consent settlement rule now under which it is much easier to negotiate a settlement than it was in prior years. As difficult as it may sound to some of you, the only problem that we have now is to agree upon the terms of an order.

There was a time when we had to agree upon findings of fact, and that is where we met more stumbling blocks, and I believe, Governor, that is the reason, that the change in the rules is the reason for the increase in the number of consent settlements.

It is much easier now to settle cases with us because of that change. That isn't to say that the orders are any different from what they would otherwise be, but the mechanics are easier.

And one thought I would like to leave with you today about the use of our consent settlement procedure is this. If you determine that you want to negotiate a settlement, or determine that our views would sufficiently coincide with yours to make it

desirable for you to do it, I would suggest that you make your negotiations as early as you can.

There are several reasons for it, some of which are human reasons.

If an attorney studies his case and prepares it properly and subpoenas his witnesses, he is somewhat less likely to entertain any settlement less than complete victory. That is not to say that we don't try to get what we think the right result is, because we do even in consent settlements.

But we do, and I believe this is not as commonly known as I once thought, we do continue our investigation during the course of trial. We continue them after complaint is issued, and even up until the trial ends.

I think you will find that we are in possession of a more damaging array of facts as we proceed to trial than we were at the time the complaint issued. So as a practical matter I think you would do well to commence your negotiations early.

Then too, if hearings do start, issues are sometimes raised that cannot be resolved by people at my level. I think of several cases that I have had a hand in where issues that had not been resolved by the courts had been raised, and the staff at the Commission cannot, and I am sure never will, take the responsibility for trying to decide questions of that kind, which only the Commission and the courts can decide. So that is another reason why I believe you should start early in your negotiations.

The other suggestion that I wish to make to you is that if you are involved in a proceeding that involves a number of respondents, and it is determined by the group or any part of the group to enter negotiations, that you select either a committee of two or three as a coordinating committee, or even better still, just one lawyer to negotiate for the group.

That does not mean to say that the entire group will not have the final decision, but when you have a number of attorneys pulling in different directions, it is awfully difficult to reach any kind of an agreement.

I have seen cases in which negotiations broke down for that very reason, and which I believe could have been settled if we had been dealing either with one or two or three lawyers.

There are other ways that we can shorten proceedings that you are all familiar with, but I have been talking about the one which disposed of an entire proceeding.

It is possible, as you all know, to stipulate facts with the Commission to save long hearings, and we still of course engage in that kind of stipulation.

It is also possible to stipulate facts and reserve to yourselves the questions of law that you want to argue before the Commission. But as the figures you have just heard indicate, most of our settlements are of the first type.

QUESTION AND ANSWER PERIOD

MR. H. THOMAS AUSTERN: I would like to talk a little bit about the role of a hearing examiner. Rule 325, as you know, of the Commission rules, which you indicated was modified some years ago, now permits the settlement of a complaint by a negotiated cease and desist order at any time during the course of the proceeding.

And sub-paragraph D of that rule specifies that the hearing examiner to whom the settlement is submitted shall, within 30 days, pass upon the settlement that has been agreed to both by counsel in support of the complaint and the respondent.

And the hearing examiner is authorized to reject the settlement by a notice of rejection or to accept it in an initial decision.

Now many of the lawyers practicing before the Federal Trade Commission have become constantly baffled trying to understand what role the hearing examiner is supposed to play in these settlements. Now let's look first at the case where the settlement is made after the complaint is issued but before any evidence is taken. All that the hearing examiner has before him is the complaint.

The parties with their respective knowledge of the allegations, the evidence, the issues, hammer out the settlement. All the examiner has is the complaint.

I should like to ask you on what basis can the hearing examiner operating in a complete vacuum make any judgment about that settlement?

MR. CREEL: Well, he is pretty much in the same position as a trial court who accepts a settlement between prosecuting attorney and the defendant. He has to take pretty much on faith what he is told in the settlement.

I think that more than that, he has to assume that the attorneys supporting the complaint are acting in the public interest. Obviously he doesn't know anything about what the evidence would have been. But I would say that he doesn't play a very great role.

MR. AUSTERN: I suppose you would agree with me it would be highly improper for the hearing examiner either to preside at or participate in a settlement negotiation.

MR. CREEL: Well, I don't know whether improper is the word. It would be a profitless gesture if he did.

MR. AUSTERN: Would you make any admissions in front of him while you were trying to settle the case?

MR. CREEL: No, I would make few admissions and I would expect you to make even fewer.

(Laughter.)

MR. CREEL: In other words, he might ultimately have to decide the case, and obviously nobody is going to make any very damaging admissions at that stage. It is very similar to the situation in any case where negotiations are not admitted in evidence.

MR. AUSTERN: Well, one of the great changes in that settlement rule is that you can now settle a Trade Commission case even after the hearing has begun. The stated rule, however, still says that the consent order can be interpreted only against the complaint and the settlement agreement.

You can never look at the record you have made, and of course no findings are made by the hearing examiner where you have a consent settlement.

Once again, I would like to ask you on what basis can the hearing examiner decide anything about rejecting or accepting the settlement? Isn't it the same as in the former case?

MR. CREEL: It is as a theoretical matter exactly the same, because he is limited by the terms of the settlement to consider only the complaint and the agreement.

It is possible that human beings being what they are, if he has heard part of the evidence, it might make him understand some of the reasons for some of the provisions in the order. But I agree that it is the same, essentially.

MR. AUSTERN: And you can't brainwash him, but he is not supposed to look at the record.

MR. CREEL: That's right.

MR. AUSTERN: Well, now, Ed, as you and I learned together, if the proposed settlement is rejected by the hearing examiner operating in this vacuum, the rules go on to say that both Commission counsel and respondents' counsel can file a joint appeal.

Can we agree that the actual practice is for the Commission not to hold a formal hearing but to invite parties to an informal conference to discuss the settlement?

MR. CREEL: That is true. There haven't been to my knowledge, any formal appearances, but the Commission has on several occasions, called both sides into an informal conference and inquired about some of the things that troubled them about the provisions of the order.

MR. AUSTERN: Wouldn't it be better to change the rules to provide the hearing examiner as merely a conduit to transmit the settlement to the Commission?

MR. CREEL: I don't know whether it would or not. As I said in the beginning, they don't play a very great part, and can't, because they don't know anything about the case.

If there are any obvious errors or shortcomings in the settlement, they can and on occasion have found them and rejected the settlement.

Presumably the Commission would have found those same errors. It does provide some additional reviews that the case might not otherwise get, but, essentially, I don't think that it is a necessary part of the procedure to have it go through him and be considered by him.

MR. AUSTERN: Well, Mr. Creel, let's indulge the assumption that what Bob Bicks just called the much-oversold commodity, administrative expertise always prevails at the Federal Trade Commission.

I would like to ask you why is there so much rigidity in the individual Com-

mission counsel as well as variances among Commission counsel as to what is an appropriate form of order.

You said a minute ago, I believe, that all the respondent's counsel need agree upon with the Commission is the form of the order. But many of us have had the experience in settlement negotiations of finding that opposing counsel has become enamored of a particular form of order.

I suppose that is probably because the form of order he has was adopted by the Commission in a litigated case or even proved by a court, and not unnaturally he thinks it is a fine order. Of course, there are other lawyers at the Commission who may have different ideas about what is an appropriate order.

Would you agree that it might be better in these consent settlements, at least, to have a little more flexibility more of this expertise, and that each order should be fashioned to the needs of the particular proceeding.

MR. CREEL: Well, I wouldn't agree that they are not fashioned to the needs of a particular proceeding, but what you say is true, that lawyers having perhaps written themselves certain provisions in other cases think that they are necessary in all cases. There is a certain amount of that.

Just as there is among lawyers representing respondents in believing that every proviso that they ever saw should be in every case that they have. That is a natural sort of situation. But of course the order should meet the needs of the case.

MR. AUSTERN: In the light of what has just been said, about the Department of Justice operation in settlements, I would like to talk about this reopening point with respect to the Federal Trade Commission:

There is another rule of the Commission that provides that an order may be changed after a hearing as to whether changed conditions of fact or law or the public interest are required.

Bob Bicks said a minute ago that a consent decree is a bargain, and you have to stick to it. The Commission rule which requires that the reopening provision be put in every consent settlement somewhat negatives that.

But what bothers some of us is that the only thing that remains in the record in the settlement of a Federal Trade Commission case is the settlement agreement and the complaint.

And unless it is to be blithely assumed again that everything alleged was true, I would like to ask you what yardstick remains for measuring whether conditions in the future have changed. What do you measure it against?

MR. CREEL: Well, it is rather difficult. It would seem to me that the only yardstick that you could use would be to determine by evidence what the practices were prior to the time of the settlement and what they have been since.

MR. AUSTERN: Of course you will agree that the rules of practice permit a respondent to deny that he violated the laws alleged in the case, and of course there is no admissions except as to jurisdictional facts.

Wouldn't it be perhaps more appropriate, fair, and reasonable to provide that the Federal Trade Commission settlement proceedings not be reopened, and if there is a future violation of law deriving from some changes and additions, wouldn't it be a cleaner procedure to bring a new complaint?

MR. CREEL: It probably would be in most cases. Of course, we have had so little experience with that.

Very few cases have ever been reopened, and I think by and large it would be easier certainly for us and perhaps for a respondent to start out fresh with a new complaint.

MR. AUSTERN: I think possibly some of us in the room would suggest to the agency that when you have to tell a client that you can settle the case, but this hookerage remains that the Commission can reopen it at any time, that that is a rather difficult thing to explain.

MR. CREEL: That may be, and that provision is not in that settlement nor in that order by accident. The statute requires the Commission to do that. But we couldn't have any settlement unless the Commission was free to reopen, should the public interest require.

MR. AUSTERN: As I understand it, whenever the Commission wants to reopen a consent settlement, and, as you know, I was once there, it does make a new investigation.

Wouldn't it be better that if you find that the man has violated the order, you bring a civil penalty action or if you find that the situation is changed and the facts are different, then you have nothing to measure with what the changes are, that you bring a new complaint?

MR. CREEL: Well, of course, you have to have the investigation to determine whether there is a violation of the law.

And when you start measuring that against the order, and if it is determined that while it is a violation of law, it is not a violation of the order, then you have to determine how best to proceed.

If the complaint, the original complaint, was generally enough to cover the practice, it conceivably would be easier to reopen the old complaint. But, as I say, we have had so few cases, in fact the one you are talking about is the only one I can recall at the moment.

MR. AUSTERN: Well, as a brief reprise, it is my understanding that the counsel in support of the complaint is at least familiar with it, if he wasn't the man who actually drew the complaint, what would you say to the same question as propounded with respect to Commission practice when you sit down to negotiate, does the man on the other side of the table start out thinking that everything that is alleged is true and you must take it as true?

MR. CREEL: As a practical matter, yes. I would say so.

MR. AUSTERN: And any ambiguities in the complaint would be resolved against the respondent.

MR. CREEL: Well, I wouldn't agree that there are ambiguities, of course.

NEGOTIATION AND SETTLEMENT PROCEDURES IN THE FEDERAL POWER COMMISSION

By Willard W. Gatchell,
General Counsel, Federal Power Commission

The assignment of the topic, "Negotiation and Settlement" has a different connotation in respect to the work of the Federal Power Commission and other regulatory agencies than it does

either with regard to the work of the Department of Justice or the work of the Federal Trade Commission.

In fact, I think we probably differ in a very material respect from the work of any other agency in the Government in that we deal with a very limited group of companies, wholesalers, transmitting or selling electric energy across State lines, or wholesalers transmitting or selling natural gas across State lines.

Leaving out for present purposes the independent producers, we have two or three hundred interstate pipelines, and only about 60 or 70 major pipelines. We only have a few over 100 interstate electric companies that are of any substantial size, so that we deal essentially with large groups.

Now, bringing the independent producers in for the purpose of completing the picture, those producers who may number around 5,000 in all must, by the very nature of things, sell their gas that moves in interstate commerce to an interstate pipeline.

And, therefore, the public relations' aspect which so vividly comes into the picture of the regulatory action of the two groups from which you have already heard, the Department of Justice Antitrust Division and the Federal Trade Commission, the public relations' aspect is approached differently. The public consumes electric power and natural gas at the burner tip by purchasing from the distribution companies and it is these companies who act as the customers of our regulated companies that represent the public, together with the State regulatory agencies, and who present to us secondhand the viewpoints of the consumer.

Therefore, I think the staff of the Federal Power Commission, and, surely, the commissioners themselves, have a very close consciousness of the need for consideration of the interest of consumers.

In fact, I have found the phrase of "protection of consumers" in more Federal Power Commission cases than in any other cases of regulating agencies. And the necessity for the court to refer to the interests of consumers arises from this fact, that we deal with the wholesalers.

But it also has a very direct relation on the subject that you are now discussing, Negotiation and Settlement.

Primarily, two principal functions come across the picture in this connection: First the issuance of a license or a certificate of public convenience and necessity, and second the regulation of rates.

Now in the issuance of the license or a certificate, it is very seldom that the negotiation and settlement of issues is called into play. We have our big fights in the issuance of licenses, as in *Hells Canyon,* where a group of determined people claim to know what is in the public interest far better than the Federal Power Commission or its bureaucratic staff could know, and therefore they oppose the issuance of a license.

The only way to have our resources developed, they claim, is by the munificent generosity of the Federal Government and therefore no licenses should be issued.

Now, when you meet opposition like that, there is no use talking about settlement. I wish we could have.

In the issuance of a certificate for public convenience and necessity for a natural gas line, however, there are municipal distributors or representatives of consumers such as the chamber of commerce or an industry group who want gas service in a particular area, and so you may have as many as 50, 75, 100 or even 200 intervenors coming into a certificate case. And there again the probability of settlement is remote.

Quite frequently, the staff tries to help those intervenors who are uninformed, by advising them of the procedures and the manner in which things can go. Quite frequently, I am happy to say, they rely upon the staff, because they do not have the resources or the skills to prepare their case adequately, and we do try to go into these matters very thoroughly.

In reality, the question of negotiation and settlement comes up basically only in connection with rates.

Now I mention this clear distinction between the work of the Federal Power Commission and the other regulatory agencies as dealing with wholesalers almost exclusively, because, in the rate settlements you have experts dealing with experts.

We have not been troubled with the problem of unauthorized practice before the Federal Power Commission or nonlawyers coming into our cases, because the companies involved are usually of such size, aside from the producers, that they must maintain constantly on their staffs a very large corps of attorneys.

The intervenors who come in to oppose a rate increase sometimes do and sometimes do not have attorneys to represent them, but when we find that a rate case is getting pretty hot, we are frequently approached by those who are interested to see if there cannot be a settlement.

At the time that such a proposal or suggestion is made, everyone who has intervened, everyone who is a party, must be invited to participate, or we will not participate ourselves as a staff in the rate-settlement conference.

And if they do not come to a rate-settlement conference after having been offered the opportunity, the intervenors are presumed to leave their case in the tender mercies of the FPC staff, because they never expect any tender mercy from a natural gas company or an electric power company, and I don't think that they will.

But when they come before us in a rate settlement conference, we have some very fixed views. Our technical staff—I mean the rate engineers, the geologists, economists, the rate experts who have worked on the case and the attorney who participates in the rate settlement conference—have definite views as to what might be a reasonable rate, and for some mysterious reason that has escaped my knowledge, a misguided gas company or power company always thinks we are too low. We think they are too high, so there is the basis for negotiation.

But just remember if we allow an increase in rates, that increase must be passed on. Now, I don't know how many of you read the *Memphis* case decided on Monday and the newspaper account of how Mr. Justice Douglas said the Federal Power Commission never had any refunds where rate increases were later disallowed.[1]

That was just not so, and the fact is that the Commission has allowed only 60 per cent of the rate increases that were sought. And it has required the other 40 per cent to be refunded.

So that as a part of our negotiations for a settlement, we have in mind that some time when the case is finally settled and the Commission has approved the settlement, there is going to be a return of the excess money collected from the customers of the pipeline.

Most of the state commissions that I know about insist that those refunds be passed on down to the ultimate consumer. And there are many millions of dollars which have been passed on to the ultimate consumers in one way or another.

In doing this, we also add a little matter of interest so that

[1] *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division et al.*, 358 U.S.—(decided Dec. 8, 1958). Justice Douglas said in his dissent "If the Commission should ultimately decide in a § 4(e) proceeding that the new rates are not just and reasonable, the victory for consumers may be an illusory one for administrative difficulties make it doubtful that they will receive the benefit of any refunds."

there will not be unjust enrichment of the gas or electric company that has overcharged for the period that the increased rates have been in effect under bond after suspension.

Now, that is a phase of this problem that causes these gas and electric companies to be very chary about rate settlement cases, and so they have come to us in the cases with which I am familiar and about which I have talked to our staff where there has been participation.

These gas and electric companies come to us prepared to really wrangle over every item as to which a question is raised. One of the things which you, as practitioners, might want to know would be how can you get up some point that has not been raised by the staff? Well, that is why the settlement conference must be open to intervenors.

We have found intervenors raising points that have been overlooked by the staff, and they have brought before the settlement conference very pertinent points. So that at the time that the conference starts, not only are the issues still undefined, but the items to which examination should be directed are still unknown.

The ultimate objective is to arrive at a certain figure as to what will be the total return, the gross return to the company or the rate of return which it should be allowed to earn.

We have stuck pretty close to 6 per cent or below for the electric companies and interstate pipelines, and a little bit higher for the independent producers. But the rate of return is an equally important matter, and that calls for some very informed judgment as to what is a reasonable rate of return.

I don't know any way to get that informed judgment other than by the staff of a regulatory agency which deals with it all the time.

When you have had one case after another, I think you do acquire a familiarity which is priceless in these rate negotiation settlement cases. I don't know that it would be possible to carry on a rate settlement conference without having these expert technicians, in addition to the attorneys, able to advise on their views. And a settlement to me means that somebody concedes something on both sides.

Now the fact that we are not overly generous in our concession does not mean to me at all that we are not willing to make concessions. I think we do, but I still say that we must look to the ultimate consumer.

For if we let him down, it seems to me that we are letting down the whole regulatory process. And if a representative of a regulated company expects to come around to a rate settlement conference where I am in it, he doesn't expect to walk in there and just say, "Mr. Gatchell, you are wrong" and walk out, because we just can't work that way.

QUESTION AND ANSWER PERIOD

MR. GEORGE D. HORNING, JR.: As you know, I am a comparatively recent practitioner exclusively before the Federal Power Commission, and prior to that time I was a trial attorney here in the district courts.

I was a champion of pre-trial settlement conferences, and I must confess to you that in my experience before your agency, I am terribly disappointed at the failure of the Federal Power Commission to avail itself effectively of the pre-trial procedure and the offers of settlement and settlement negotiations as a result of which, in this district and in this District Court, we settle over 90 per cent of the cases which are actually filed.

Now, in my experience in your agency, I have yet to see a case of any importance in which I have been engaged to which I have even been invited to a conference or there has been any offer of settlement negotiations or even holding out the branch of peace for a settlement negotiation.

And I am amazed at our rule which does not require, such as does the rule of the District Court and many of the agencies that I have heard during this presentation, an initial pre-trial conference in an effort to settle the issues which are involved, to simplify them and to present our long protracted hearings on matters which are really not at all in issue.

Now perhaps my experience individually does not represent the experience at large. Could you tell us and furnish us with any statistics as to in any given year the number of rate cases which are heard, the number in which there was even a pre-trial conference, the number in which that proceeded any further to actual bona fide settlement negotiations or those in which any settlement occurred?

MR. GATCHELL: That is a fair question. I know you ladies and gentlemen will realize that Mr. Horning and I don't see eye to eye on these things. In fact, I am not sure that he is able to read too well, because Section 1.18 of our Rules and paragraph e dealing with offers of settlement says:

> "Nothing contained in this section shall be construed as precluding any party to a proceeding from submitting at any time offers of settlement or proposals of adjustment to all parties and to the Commission or to staff counsel for transmittal to the Commission."

We would be glad to have Mr. Horning submit any offers of settlement, because we would consider them.

MR. HORNING: You haven't answered my question.

MR. GATCHELL: I am getting to it.

MR. HORNING: You are taking a long time.

MR. GATCHELL: I am getting to it. For those of you who are not familiar with the natural gas industry, I may say that when I became general

counsel a little over five and a half years ago, we had pending a great many rate cases involving interstate pipelines.

That first year we settled 32 rate cases, and they were tough cases. They were big amounts. They were large companies involved. That was three times the number that had been settled in any single year prior to that time.

Now, that is the last year that we have had any substantial number of rate settlements, because the year after I became general counsel, the deluge descended, and on June 7, 1954 the Supreme Court said that we had jurisdiction over independent producers, and we were spending the next four years trying to keep our heads above water, not trying to settle rate cases.

We were trying to get producers into some semblance of regulation. We are now picking it up, Mr. Horning, and trying to see if we can not have some rate settlement conferences.

We have been conducting a number of such conferences only recently. One of them is still in progress, and I fully expect that we will return to the plan which we put into effect very effectively early before the producers came under us of settling these cases.

Now, as to the pre-hearing conference, that is another subject with which I presume I am in agreement with more of the practitioners than in any other field that I know of.

I think we ought to have pre-hearing conferences. The Federal Power Bar Association, which is composed of practitioners who come before us, has set up a committee, and Mr. Mann, who was on the panel yesterday afternoon, is chairman of that committee, and has set up a committee which is working with us.

I have attended all of their meetings, where we are trying to work out a more effective means for putting this pre-hearing conference business into operation.

The means of shortening the time for action by any of these regulating agencies is available to all of them. We can shorten the time of our cases I know if we will have some of these pre-hearing conferences.

And I want to get Mr. Horning in on a pre-hearing conference where we do a little more than at the first pre-hearing conference that he attended. At the first one he came into, where we discussed what he might attempt to show by way of support for the rates of an independent producer that he was representing, I didn't think we made much progress with him. I hope he has learned a little more since then and will help us out a little more.

(Laughter.)

MR. HORNING: Well, now that is the vice of the whole thing. My question to you was why should not our rules be changed so as to require, not merely permit, pre-hearing conferences, and at such conferences be presided over by the presiding examiner in the manner analogous to the procedure adopted throughout the United States in the Federal District Court, wherein not only is there a pre-trial conference, but a determined proper effort to effect a settlement?

MR. GATCHELL: I am not too sure that I would not agree with you that a great deal of what is embodied in that question is not desirable.

I am strongly of the opinion that we could make more progress if we had more pre-hearing conferences, and an amendment of the rules could very well be proposed and considered.

However, there are questions which come up when you attempt to draw such a rule. It is not practical to have a pre-hearing conference in every case. And who is going to decide when that should be done? Our present method of operation under the rule that I refer to leaves that to the parties.

Now, you are saying why shouldn't it be required, and why should not the examiner preside at these pre-hearing conferences? Well, I think in many of them that the examiner could well preside. But as soon as they got to the point of negotiating differences, and one side conceding and another side conceding, the examiner might just as well leave or there will be no negotiation.

If we are in there, and I hope that we will be in any of these pre-hearing conferences, I myself would certainly not consent to the slightest modification in the staff's position if the examiner was there, because those negotiations might break down, and then that examiner would sit in the hearing.

And whether he tries to wipe it from his mind or not, there is an impression that has been placed on his mind that staff counsel is a little shaky. And the same thing would be true were I representing a gas company.

I would have a feeling that by conceding that we had put $500,000 or so into an account just out of an abundance and maybe it might be shaved down, that much would remain in the mind of the examiner. So I would certainly not want the examiner sitting in on the negotiation conference.

I think when we get into the pre-hearing conference to negotiate, that is where the examiner ought to go out. But certainly the examiner can be in there and should be in there to bring the staff, the intervenor and the applicant companies before them to agree upon facts which now unfortunately go into a hearing and there are pages and pages of transcript needlessly consumed in hearing points that should be settled.

Many things can be agreed upon and should be. And if they were, the time would be shortened for Commission action.

MR. HORNING: Those same arguments were advanced when pre-trial was first considered as an amendment to the rules for the United States District Courts, and we have found by experience, as you well know, that a trial judge can sit in at a preliminary conference, pre-trial, wherein settlements are discussed.

And as Mr. Ailes pointed out here today, you negotiate from $25,000 down to $10,000 and then each side trying to get together, and finally the thing blows up.

The same judge puts on his robe, goes out on the bench and tries the case and does it fairly. Are you inferring to this audience that your trial examiners could not practically remove from their minds and render a fair and impartial decision based solely on the record? If so, it would seem to me that you ought to get rid of the trial examiners, because they are essentially judicial in character.

They have been chosen for that purpose. They must realize as lawyers themselves that lawyers frequently undertake settlement negotiations apart from the judicial aura or atmosphere, but that doesn't prevent a lawyer from trying his case properly and without any recourse to settlement negotiations.

So again I want to pose the question to you, having conceded to me now that you want pre-trial conference but you want to separate from the pre-trial conference any offer for settlement or any discussion of settlement, are you

content with the limited effect which could be procured merely from the simplification of issues?

MR. GATCHELL: That sounds to me like one of these lawyer questions with a good many imponderables. I certainly am not reflecting upon the examiners any more than I would reflect upon a judge.

What I am talking about in this business of not conceding in the presence of a hearing examiner I think is inherent in the way that our cases come up. However impartial and however competent the examiner may be, I would be fearful, nevertheless, that if I was to concede something in the pre-hearing conference or in a rate settlement negotiation the examiner would just wonder in his mind when the case was presented in the hearing and the witness got up to testify to the same thing that I had conceded but sticking to the higher figure, the examiner would wonder in his mind "just why the concession?"

And it is that phase of it where I am adamant as far as I am concerned. I would not want to participate at that stage.

MR. HORNING: Won't you concede that when he comes to his initial decision from his concluding on the record, the examiner's finding must be supported by the evidence in the record?

MR. GATCHELL: I certainly hope they are, because if the Commission relies upon what the examiner says, and we have to go to court, I want to be supported by substantial evidence all the way up, so I would hope that the examiner would start the proceeding by being supported by substantial evidence.

MR. HORNING: And then isn't there adequate protection should he per force decide the case contrary to the evidence or without substantial support in evidence in the record?

MR. GATCHELL: I don't think there is too much disagreement with us on it. I think that there is adequate protection if the Examiner relies upon substantial evidence and cites it in the record, but it is the relationship of these things that is so vital.

In a rate case you are not dealing with simple issues, even in the matter of rate of return or investment in the particular account. You are dealing with things that are of a highly technical nature, how much depreciation is proper and so on and so forth.

Those things could well be supported by substantial evidence. For that I think when you fix rates you are dealing in a matter of judgment so much that I want the examiner's judgment completely unfettered when the case is heard by him fully.

MR. HORNING: I listened rather attentively to your talk, and I have one other subject that I couldn't understand what you were driving at.

Do you distinguish the Federal Power Commission from the other Commissions in the Federal Government which do have pre-trial and settlement conferences as outlined here merely because we deal with selected individuals, and because we are wholesalers?

MR. GATCHELL: No, sir.

MR. HORNING: If not, what is the valid distinction in your opinion?

MR. GATCHELL: I referred to that fact so that you, the audience here and I know you are already familiar with it, would appreciate why it is that

we don't have quite as many cases numerically in some of these deals as some of these other agencies, and why it is that we are dealing with experts in this field.

MR. HORNING: I have just one final question that I wanted to ask, because I couldn't leave this one alone.

Mr. Gatchell referred to the famous *Memphis* case in support of his statement of his duty to protect the consumer. Isn't it true that the *Memphis* case for the first time has said that there is on your agency a like duty imposed to protect the pipeline?

MR. GATCHELL: I have said and told the House Committee on Legislative Oversight that the consumer cannot be protected in my opinion unless the pipelines are kept in a healthy financial condition, and that goes for producers as well.

I do not think that I am working against consumer interests when I say that a pipeline should have an increase in rates. I think we may be doing the best thing for the consumers if we allow an increase in rates where that increase is justified. Although I would apply that also to producers.

Certainly we must keep these companies in a healthy condition or the industries are not going to do the service that they should do.

IV. AGENCY AND JUDICIAL REVIEW

INTRODUCTION

By William R. Connole, *Moderator,*
Commissioner, Federal Power Commission

Our subject matter falls easily into two categories: the first category being the review of agency actions within the agency, in other words, the review of examiners' decisions by the full Commission, the review of a decision of the Commission by the full Commission, review on reconsideration, and that kind of internal organic review. The second class of review with which our panel will deal is the more obvious one of judicial review. That is the subject to which the last half of our panel will be concerned.

Now the general wrap-up of the subject will be the kind of view from Olympus type of approach by one of the members of the staff of the New York Times. But again without laboring identification of the individual members, I propose to let each one speak briefly. Then following these direct proposals the door will be locked to prevent anyone leaving the room, and the question period will start.

So then we reach the first speaker. Rosel Hyde has been a member of the Federal Communications staff since its formation in 1934, was Chairman for quite a few years, probably has more experience in this business than I dare say generally anyone in the room, considering the breadth and scope of it.

PROCEDURES FOR REVIEW WITHIN THE FEDERAL COMMUNICATIONS COMMISSION

By Rosel H. Hyde,
Commissioner, Federal Communications Commission

The subject assigned to me for the initial presentation in this panel discussion is review activities within the Commission. It was also indicated to me that I might say a few words about what is needed, and that will be the conclusion of my statement.

The bulk of the FCC's adjudicatory work is handled by hearing examiners in the first instance. Our handling of the matters after that does not come within the usual definition of review.

However, under the statutory scheme of things, the final decision is the responsibility of the Commission. In other words, we have primary responsibility, not just review responsibility.

In considering initial decisions, the exceptions and arguments relating thereto, the Commission must, of course, give serious consideration to the recommendations of the hearing examiners. Decisions of the Commission, particularly with respect to policy, will, on occasion, disagree with the recommendation of the initial decision. The responsibility for such judgment is placed upon the Commissioners.

On findings of fact, the Commission also has considerable latitude in all such judgments, and particularly where questions of demeanor of witnesses is concerned, careful consideration must be given to the examiner's findings.

The place of the examiner's findings of fact and initial decisions in the agency's deliberations is clearly stated by the Supreme Court in the *Universal Camera* [1] case, which in the interest of time we will not discuss further. May I direct attention to what I think is a real distinction between a decision of the usual court of law and the decision of an agency such as the FCC.

Generally a decision of the court of law will be concerned with two major considerations, the facts of the case, and the applicable law. In an administrative agency decision, there is a third consideration, the public policy determination of the agency concerned.

The Court of Appeals for the District of Columbia recently emphasized this point in the *Pinellas* case.[2] Now the Communications Commission must consider thousands of applications for radio facilities each year. In many instances there are conflicting applications which involve adjudicatory contests.

The volume of the records in these cases is staggering, and I mean it literally. In some recent cases the records have filled as many as 15 to 20 large docket volumes. This statement is somewhat of a protest, as you will recognize as I go along.

In a recent case proposed findings of fact, replies to proposed findings, supplemental proposed findings and supplemental re-

[1] *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951).
[2] *Pinellas Broadcasting Co.* v. *F.C.C.*, 230 F.2d 204 (1956).

plies totaled over 1,600 pages. The examiner's initial decision was 200 pages, exceptions 313 pages, which, together with briefs in supoprt of exceptions, totaled 500 additional pages.

But the avalanche in such matters is not limited to the final phase of the proceedings. A brief check indicated that an average of ten interlocutory proceedings were filed in each of the television cases which the Commission has decided recently.

In a radio case which I think is like many others, there were 25 interlocutory pleadings to be considered. In a specific case there were 18 dealing with the same subject matter.

The agency has attempted to bring this type of activity within reason, but efforts to limit pleadings in briefs can scarcely succeed without the bar assuming a greater responsibility with the purpose of keeping things within manageable proportions in mind.

We have made several attempts with advice of counsel and with discussions with members of the bar to work out procedures which would limit the overall record to reasonable proportions, something that can conceivably be handled within the lifetime of a litigant.

We have hoped that when the Commission has entered its decision and the case has gone to appeal, the principal litigant will not have died, for the court may send the case back to us to start over with his heirs and successors. We have had that happen in more than one case.

Now you might say that this sounds strange for officers of the Government charged with responsibility here to complain about their own procedures. I am making this protest because our own procedures are the product of what lawyers have created. It has been brought about by legislation, it has been brought about by habits and practices of practitioners.

We are not alone in a situation that has made administrative hearings almost unmanageable. I say almost. I am protecting myself a little bit here.

I agree in the main with a recent editorial in the Washington Post. In the interest of accuracy, I think I should refer to just a line from it:

> Regulatory agencies under State as well as under Federal level move much too slowly in an economy that often will not or cannot wait for bulky and balky bureaucracy.

There is a further statement in the editorial worth noting:

> "Much of the fault can be traced to the legislation which set up the agencies." [3]

Well, as lawyers, we have responsibility for how we carry out our functions. We have a certain responsibility in the kind of legislation that gets on the books because we all make contributions to it.

I am of the view that administrative hearings as they are now conducted leave much to be desired. I am tempted to say that they are unsatisfactory.

I think that they do not give even the appearance of justice when they are dragged out unduly. I think that the long delay has a casual relationship to the difficulties which develop in contested cases.

As members of the Bar, as persons interested in administrative law, and having in mind the values which we hope to achieve through the administrative type of agency, we should give more careful attention to ways and means of completing an administrative hearing equitably and expeditiously so that the public, which is the principal interested party in the case that comes before an agency such as FCC, can have the benefits of justice in both form and substance.

PROCEDURES FOR REVIEW WITHIN THE FEDERAL TRADE COMMISSION

By Robert I. Mac Iver,
Assistant Director, Bureau of Litigation,
Federal Trade Commission

After hearing the views of Commissioners who are in the position of giving the birds'-eye view of the administrative process, I think the best guess as to why I am on this program is to provide a contrast.

I can give you the worms'-eye view of the lowly Government attorney who, while he may not be able to discuss matters of high policy, is extremely sensitive to any changes that are occurring in the administrative process which may affect the decision of the cases for which he is responsible.

[3] Washington Post, Friday December 12, 1958.

In my opinion, there is occurring gradually a very important change: that is, one of increasing emphasis on the decision of the hearing examiner.

Not too many years ago, the only function of the hearing examiner at the Trade Commission where I work was to preside at the hearing. It is true that he filed a recommended decision but, frankly, it was merely a summary of the transcript of testimony, and no one paid much attention to it, even in the briefs or in the Commission's decision. The reason for that lack of emphasis on the hearing examiner's decision at that time was that there was a fundamental belief that the administrative process was designed for decisions to be made by the Commissioners themselves.

The Commissioners are appointed by the President for the purpose of making a decision. They are confirmed by the Senate. They are placed in a position in the agency where they can get the over-all viewpoint and become experts in a reasonably short period of time. In addition to that, they are furnished with a staff who can be of great assistance to them in reaching decisions. This staff is not available to the hearing examiner.

Now, almost immediately, the bar started to attack the idea of having any kind of expert advice in reaching a decision. This was labeled as being an institutional decision.

And the reason it was so criticized was that the trial attorneys were fearful that the decision might be influenced by the erroneous views of some anonymous expert they couldn't get to. They couldn't find out even what his views were so they could answer them.

All trial attorneys, I believe, are anxious to have decisions made solely on the basis of the record. In that way, they are given an opportunity to present their side and answer any theories or arguments which are advanced to influence the decision.

As a result of this criticism, I think that the agencies now are swinging over to the opposite extreme, and that the hearing examiner's initial decision is being followed in a great percentage of cases.

For example, in matters involving procedure, hearing examiners are practically never reversed. At the Federal Trade Commission recently, there were two contrary decisions by hearing examiners on procedural matters, and both were affirmed by the Commission, although they were opposite, on the ground that the

hearing examiner was the man on the scene and should know what the correct decision should be.

In matters of decisions on the merits, more and more the hearing examiner is not being reversed unless there is the clearest kind of error. And it even goes further than this.

As you heard in the discussion of the earlier panels, if there is a consent settlement submitted, both sides agree on what the settlement should be. Under the rules of the Federal Trade Commission that is submitted to the hearing examiner, and he is supposed to make a decision as to whether or not it is an acceptable settlement.

He must therefore make such decisions as to whether it is proper to dismiss one of the charges in the complaint so as to settle the rest of the case. He must make that decision in a complete vacuum. He is not permitted to see the investigational files. He is not permitted to confer with any member of the staff, and he doesn't even have access to the reasons why the charge was put in the complaint in the first place.

Operating in a vacuum, then, needless to say, there is a tendency for the hearing examiner to play it safe. If he doesn't know for sure whether it is a proper decision, the tendency is for him to say, "Let's try the matter. Let's settle it." And I think that is a bad result.

If he does reject the settlement and it is appealed to the Commission, the Commission also places itself in a vacuum, and attempts to make this administrative decision on the basis of a record as if it is an appeal court. They don't look at the files. They don't confer with the staff. They try to decide it on the record, and there really isn't any record.

Now, they do allow themselves one loophole which is very valuable. They permit the members of the trial counsel from both sides to come before them, and in the presence of each other to state why they think the settlement is acceptable. This is a very valuable thing, it is true.

Now, the point that I am trying to make by all this is that the Federal Trade Commission is leaning over backwards to try to follow as nearly as it can the procedures established by the courts. In my opinion, in some cases, perhaps they have leaned over too far backwards, but the end result is no one can question that they get a very fair hearing before the Federal Trade Commission at the present time.

I believe if this were thoroughly understood by the members of the American Bar Association, then the arguments that you hear at the present time, the agitation of some of the members of the Bar to transfer jurisdiction from the Federal Trade Commission to administrative courts, would rarely be supplied.

REVIEW OF SECURITIES AND EXCHANGE COMMISSION DECISIONS

By Daniel J. Mc Cauley, Jr.,
Associate General Counsel, Securities and Exchange Commission

There isn't very much that is erudite in determining from an agency view what cases are going to be appealed. In an agency like ours, the people on the other side take care of that for you many times. Whether the case arises in one of our Federal courts or whether it arises here as a result of one of our own administrative proceedings, I certainly don't know of any cases in which the agency staff has taken an appeal from a Commission decision.

However, many times there are cases where we have chosen a course of action, and outside of the protective covering of our own administrative procedure, we find ourselves out there in the cauldron of the Federal court. Of course, there we are on our own, and, as a practical matter, once we start off on a legal proposition, unless the facts develop to be substantially different from what we thought they were, we are pretty much committed to follow the case all the way.

In the time that I have, I hope you will excuse my inability to discuss what is going on in the other agencies and more or less confine myself to our own Commission.

In anticipation of one or two questions that I might expect from some of the gentlemen who are here, I think I might as well acknowledge first off that there are some areas in which there probably are important matters considered by the Commission where there is little or no opportunity for judicial review.

Be that as it may, whether or not our interpretation in the matter is a good one or bad one or correct or incorrect, it seems to me that you must carve out of a volatile economy like ours, with the shortness of time in the distribution of securities, something that is an area primarily for administrative interpretation. If the administrative agency is not properly interpreting policy, the

forum in which the determination must be made is in the Congress rather than in the courts.

For those of you who aren't certain of what I mean, I am thinking particularly of two problems that we have at the Commission: One is the problem of acceleration, and the other is the problem of comments with respect to registration statements which are filed.

We have a statutory obligation that once a registration is filed we must reach a decision within 20 days. In the event that the registration can not be cleared within that time, it has been the practice to send out a letter of comment to the counsel of the particular issuer.

That letter of comment may go anywhere from one page to be a minor registration statement all of its own, a prospectus. Now, once an amendment is filed, the 20 days begin to run all over again, and you have on the outside in the industry an issuer who wants to complete his financing, and you have underwriters who want to get on with the business. And there is an opportunity for an application to the Commission, if there is compliance for acceleration, to cut down the 20-day period.

Now, in either of those two situations, our comments on the registration or our activities with respect to acceleration, there is practically no judicial remedy, and I think we might as well acknowledge it. It serves no purpose to an issuer who needs $20 million within the next five or 10 days to spend two and a half years or three and a half years through the judicial process to find out whether or not we were right in saying that he ought to amend his prospectus in a particular manner.

We have adopted a rule which sets out the bases on which we will or will not accelerate. I think we have to carve out in that area and perhaps in other agencies another area where there can't be any judicial review. It is just not practicable and feasible for persons who disagree with us to take the time to go into court to find out if we were right or wrong.

That puts the agency I must acknowledge in a pretty good spot from its own point of view. In our agency we have two ways, as I have indicated, of getting into the Appellate Court.

One is by bringing an action in the District Court. I thought I would carve out for you one little aspect of this problem to show that it is an interesting field from the point of view of the practitioner and from the point of view of the agency.

In our definition of security, which includes, as you know, stocks, bonds and so on, we have a little item called "investment contract," and the decisions of the courts in this area have been extremely interesting.

Over the years we have gone to the Supreme Court several times in trying to obtain judicial interpretation of this so-called investment contract. The ladies might be interested to know that the silver fox that they may be wearing might have ultimately resulted from somebody's purchase of a few breeding foxes and somebody's agreement to breed them and service the arrangements so that they will sell the pelts and so on and so forth.

And lo and behold, the SEC has convinced one of the federal courts that that is an investment contract and security arrangement.

We have done the same thing with respect to oil leases which start out as real estate contracts, where there is a development arrangement or an exploration well. The courts have held that if you buy an acre of citrus fruit trees down in Florida and somebody is going to manage it for you and sell the fruit and give you the profits, that that is a security.

We have taken the position with respect to variable annuities sold by life insurance companies here in the District of Columbia —whereby they invest the money that is paid by the various policyholders, and the policyholder obtains units, and at the end of the annuity period he can decide to take his money out, or he can continue it on and get a variable annuity that fluctuates with the value of the portfolio of securities—we have taken the position that that is a security.

I must confess that we haven't had much success in either the District Court or in the Court of Appeals. But the Supreme Court has granted certiorari, and you will be interested I am sure in reading about that case some time in this next year.[1]

We have the same problem with regard to a mortgage service out on the West Coast, which services mortgage investments.

You may read here in Washington about second trusts and guarantees that go along with certain interest rates in the servicing. This is not a static situation.

From the Commission's point of view, these are live continuing problems that go on and on. It doesn't make any difference

[1] *S.E.C.* v. *Variable Annuity Life Insurance Co.*, 155 F. Supp. 521, *aff'd.*, 257 F.2d 201 (1958). Argued before U.S. Supreme Court Jan. 15 and Jan. 19, 1959.

whether it starts out from an action in the Federal Court involving a statute. It can arrive in an action of the Federal Court in which we weren't even a party, if it involves one of our rules.

I think the case that has had more impact on corporate management in the last several years is *Green* v. *Deitz* in the Second Circuit, which throws some doubt upon our rule under Section 16 of our 1934 Act as to the validity of this type of arrangement, which is an exempt arrangement under Rule 16(b)(3).

Obviously a Commission rule, the Commission has had little or no opportunity to do otherwise than either to restudy the rule and change it or stay with the rule and go to the courts. We have appeared *amicus* in two cases in the Southern District, filing a brief I believe within this month in another case in the Second Circuit, and here the Commission is faced with a question of an interpretation of its rules which arose in a private transaction or a private lawsuit whereby Mr. A on behalf of the shareholders sues Mr. B, an officer of the corporation, because he did not hold the stock that he took down on option quite long enough.

We are confronted with another type of judicial review. We are getting more of that recently. That is the type of case where a party or a person brings an action in the District Court for the purpose of enjoining a Commission hearing or a Commission proceeding.

Recently one of our hearing examiners in Salt Lake City was enjoined personally from conducting a hearing that he had been sent out there to conduct. These cases make law on the question of whether or not the District Court or the Federal Court can superimpose its views on the Commission.

I would say that the private practitioners have more control over appellate litigation than the government agencies. By developing as large a body of law as possible and through the testing of adversary ideas we find the best way under our system to determine whether or not the Commission is doing a right and proper job.

As an old general practitioner who just came down here to join one of these agencies about two and a half years ago, there is one additional observation that I would like to make. Nobody ever asked me back home in Philadelphia what my motives were for doing a particular thing. However, ever since I have been down here lawyers on the other side, people on the Hill, people in the newspapers have always been wondering what the motiva-

tion was, whether I was rewriting or somebody in the agency was rewriting the statute, whether we were conforming to the intent of Congress and just why we were doing what we are doing.

And in fact I think we are more or less here today to give you some little explanation of that. I just wish you would judge us by your own standard as one practitioner to another. You have, I am sure, good motives in representing your clients, in doing what you do, and government lawyers, as I observe them, have just as pure motives and just as good motives as you have.

Why don't you just say when we are wrong that we are human and we can err, rather than worrying about whose pocket we are in or who took us to lunch and what we were doing the night before last.

JUDICIAL TRENDS IN THE REVIEW OF ADMINISTRATIVE AGENCY DECISIONS

By Oscar H. Davis,
First Assistant to the Solicitor General

Mr. McCauley has opened for you the trap door to the last resort, the courts, and it is my job to plunge you through it and shut the door on you.

The place you ordinarily go first, of course, is the court of appeals, unless you come from the I.C.C. where you go to a three-judge District Court.

As most of you know from sad experience, the court of appeals is basically your court of last resort in administrative matters as well as in others, because the Supreme Court exercises certiorari jurisdiction in so limited a fashion.

The important thing, of course, is that you have the right to go to the court of appeals. You don't have to ask their permission. When you go there I think the first thing I should say is that that is about the last place you can get a review on the facts. That is about the last place that a court is going to say that the Commission was wrong in its determination of the facts.

I think that today there is a somewhat broader review in the Courts of Appeals on the facts than there was a decade or two decades ago, because of the changes in the Administrative Procedure Act, the new standard of "substantial evidence on the record considered as a whole."

I think really that the review of administrative agencies in most fields is almost coalescing with that of the District Court standard of "clearly erroneous." So that you have an opportunity there which did not exist at least in as great a fashion two decades ago.

But, as I have said, it is about the last chance you will have, because the Supreme Court has been almost invariably restricting itself to a determination of whether the court of appeals made a fair assessment of the record and not whether there was substantial evidence to support the findings of the Commission.

A few years ago, the court handed down two decisions in the *Universal Camera* and *Pittsburgh* cases,[1] in which they intimated that they would not have done the same thing as the court of appeals had done if they were the court of appeals. But they weren't going to reverse the court of appeals anyway.

There is an exception as far as the Supreme Court is concerned, I think, in cases that involve personal liberties. Cases involving personal liberties, which have been absent like Banquo's ghost from these discussions have an important bearing in the general field of administrative law. But in a case involving personal liberties and that vague area where there is a mixed question of law or fact, the Supreme Court is not as diffident about reviewing facts. But in the ordinary case, they just won't go into it.

Now, as Mr. McCauley has mentioned and as Commissioner Connole said, there are areas of nonreviewability, mainly because there isn't time or because it isn't worthwhile going up. There is of course still the technical area of nonreviewability, the technical area where the courts will not go into what the Commission has done. Again I think there has been a shrinking of that area in the last 20 years.

The courts are more willing to decide for themselves or at least to review Commission decisions or agency decisions in areas that used to be considered nonreviewable. The area has not shrunk to the vanishing point.

The *Panama Canal* [2] case by the Supreme Court last year indicates that there is still a good deal of vitality to agency decisions in certain fields which will not be reviewed by the courts. Similarly, I think that in the ever-present question of who has standing to seek review—whether you are an intervenor or whether

---

[1] *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951); *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

[2] *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309 (1958).

you are a competitor, or whether you can go up to the court of appeals—there is another area in which the old rules have changed somewhat over the years. That is, the courts are more and more willing to find standing in competitors, intervenors and other people who have an economic or other interest.

Still, of course, there are situations, as utility companies who have been trying to enjoin the REA have discovered in the last few years, in which you do not have standing to seek review.

But the main thing, I think, that is true of the court of appeals and of the Supreme Court is that there is a very great emphasis today on procedural fairness.

That seems to be something which the court of appeal in the District of Columbia and the courts in the other sections of the country are looking for: whether the Commission has acted fairly on a record, no extraneous considerations, no outside influences.

I am referring not only to the recent public clamor about the Federal Communications Commission, but with relation to other commissions. There is a great deal of emphasis starting, I think, with the Administrative Procedure Act of 10 years ago, on that element, and I think that the chances of review are far greater with respect to procedural fairness than they are in other fields.

I would like to say with respect to the courts of appeal that there seems to be developing—what shall I say—"specialties" among courts of appeal. There are different approaches, for reasons which I suppose are well known to the practitioners in the field and perhaps is somewhat of a mystery to others.

Labor unions against whom unfavorable labor-practice rulings have been made by the National Labor Relations Board invariably seek review in the District of Columbia Circuit rather than going elsewhere. Employers seem to go elsewhere. And this is, I think, true in other areas; that is, there are different approaches that have developed in the different circuits.

I don't mean to say that this is a very sharp distinction, but that there are differences. And if you are in a situation in which you are able to choose your circuit, perhaps it might be worthwhile going back through the books to see what the circuit has done in that particular field or in the field of administrative law generally.

Now, for a few words on the Supreme Court itself. The Supreme Court takes very few cases. Fact cases, as I said, are out. What kind of cases will it take? As has already been indicated, it is more likely that the cases that it will take will be those in

which a general issue of administrative law is involved, something that will pertain to several agencies. The Court will probably take, as well, cases in which there is a major issue relating to the particular agency, like the *Memphis Natural Gas* [3] case which is really fundamental to the conduct of the agency's business.

Or, sometimes, even if a small issue is involved, if you can persuade the Court that the agency decision or the court of appeals' decision was clearly erroneous, so clearly erroneous that an injustice has been done, I think the Supreme Court might take that case, even though it didn't involve a big issue or the general issue of administrative law.

Further than that, I think that they look to see in each case coming from an administrative agency whether the agency in the particular decision and related decisions is seeking to carry out the basic purpose of the statute, the basic function for which the agency was established.

As was mentioned in the preceding panel, the Court has consistently said that with the Federal Power Commission that the function of the Commission is basically to protect the consumers' interest, and I think that in each agency and with each regulatory statute, the Court feels that there is some similar basic function.

It looks to see whether the agency is following out that objective. If it feels that it is, I think it pays less attention to whether the immediate decision is barely right or barely wrong. I think that it gives greater weight to the discretion, the expertise of the Commission, if it feels that the Commission is following out the basic function for which it was established.

Now a few words on the significance, as it seems to me, of the cases involving personal liberties. Two decades ago there weren't too many cases involving administrative agencies that dealt with personal liberties. But since that time, we have had the draft act, and we have had a very severe immigration law. We have had passport proceedings, obscenity proceedings, security proceedings, and I think that the effect of administrative law in this field has been carried over to the regulatory agencies.

The Court suggests that the regulatory agencies should possibly be bound by the same high standards of conduct that they would insist be carried out in the areas involving personal liberty. And

[3] *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S.—(1958).

so there has been a kind of interreaction which has affected regulatory agencies.

The last thing I would really like to say is that I think that the greatest chance one has in the courts of sustaining a Commission decision is if it is based upon adequate findings, a well-reasoned opinion, a good report. The best chance private practitioners have of upsetting the Commission's decision is if the negative is true.

I don't suggest that private practitioners should hobble the Commission, but I do suggest that the Commission staff should make every effort to see that the Commission's decisions are well supported by findings and conclusions of law so that they can be supported in the courts.

VALUES OF JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY PROCEEDINGS

By Anthony Lewis,
Washington Bureau, The New York Times

My first point has already been said by Oscar Davis much better than I could: that is simply to discern a trend, especially in the courts of appeal, toward expanding judicial review.

On top of what Mr. Davis had to say, I will add a couple of Supreme Court cases last year that looked the other way from the *Panama Canal* case, which he mentioned. The first of those was a pair of Army discharge cases so-called; people who had been given less than honorable discharges from the Army because of alleged subversive activities before their induction.[1]

The lower courts held when they sued for a better discharge that the long-time practice and the statute provided no review in the courts of such discharges. The Supreme Court in procuring opinion said:

> "General judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion and . . . judicial relief from this illegality would be available." (355 U.S. at 581-2)

[1] *Harmon* v. *Brucker* and *Abromowitz* v. *Brucker,* 355 U.S. 579 (1958).

That seems to me to be a very broad statement of the availability of judicial review.

In November 1958, a case came down from the Court involving the question of whether the National Labor Relations Board had correctly excluded the hotel business from its jurisdiction.[2] A good part of the Government brief, as I recall, was devoted to the proposition that there was no jurisdiction in the lower court. The Supreme Court in one sentence reversed the decision of the Court of Appeals and found the NLRB had acted improperly. The Supreme Court did not even think to mention the jurisdictional point.

Now the question is, why is there this trend that I believe we probably all will agree exists, of a broader judicial review?

Commissioner Connole has a theory that judicial review varies according to the economic situation in the country: that in bad times the courts tend to give the agencies free rein, while in good times the courts begin throttling down again.

I think if that theory were limited to the proposition that in times of emergency the courts may be more deferential to the agencies, that theory would have some weight. But that hardly seems all of it to me.

A second reason I think was stated 20 years ago by Dean Landis in his book on the administrative process.[3] He suggested that strictness of judicial review may vary inversely with the reputation of the agencies. He suggested that from time to time some of the agencies would get a reputation for other than fair dealing, and that the courts would be generally aware of that as to particular agencies, and would review them more strictly accordingly. I think we have to some degree seen that work in recent years.

Finally I think there is a more basic reason for the expanding content of judicial review, at least a reason which seems persuasive to me. It is simply a growing appreciation of the valuable role the courts have to play in the administrative process.

Now to me that is the role of the non-expert. I think courts are apt to be more dispassionate, less likely to be committed to a particular approach or theory. They are not confined to the problems and habits of a particular industry, something that seems to me particularly inevitable in any specialized agency; and they can approach problems against the broad background of law and public

[2] *Hotel Employees' Local No. 255* v. *Leedom,* 358 U.S.—(1958).

[3] Landis, *The Administrative Process* (1938).

need without the special knowledge that may breed a special viewpoint. Despite these reasons why I think judicial review as a generality is good and is expanding, we must recognize that often the heart of the administrative process is beyond revision or correction by the reviewing courts. The courts themselves make that plain. One notes, for example, that in the many comparative television cases reversed by the Court of Appeals, the Communications Commission in reconsidering those cases has not thus far taken a channel away from the grantee with the station on the air. In situations like this, judicial review cannot get to the ultimate heart of the problem.

Hence, the problem for you and one which I would not dare to suggest a solution to, is to make the final agency decision partake more of the objectivity of the broadness of the view that the court may have, while not abandoning its expertise.

I myself would go for more emphasis at the Commissioner level on non-experts. Harold Leventhal said recently that in industry people shift from one industry to another and bring advantages for that reason. He said that at the Commission level experience or technical competence in a particular industry is relatively unimportant.

Of course different agencies have different problems, and no generality can solve it. I leave you only with my strong feeling that we should be looking at the Commission level as we do at the courts for a broadness of view rather than for technical expertise alone.